Office Supreme Court, U.S.
FILED
AUG 10 1962
JOHN F. DAVIS, CLERK

No.

In the

Supreme Court of the United States

No. 18557 (In U. S. Court of Appeals, Fifth Circuit)
HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner,

v.

ADAM McINTYRE,
(hereinafter called McIntyre)
Respondent.

No. 317

No. 19184 (In U. S. Court of Appeals, Fifth Circuit)
UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

v.

HORACE HART,
(hereinafter called Hart)
Respondent.

No. 318

No. 19427 (In U. S. Court of Appeals, Fifth Circuit)
STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

MARCOS V. AGUIRRE, JR.,
(hereinafter called Aguirre)
Respondent.

No. 319

Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The three above mentioned cases involve identical or closely related questions of jurisdiction of the Federal Courts in Workmen's Compensation cases. All three were decided June 20, 1962 by the U. S. Court of Appeals for the Fifth Circuit. Hence, this joint petition for writs of certiorari in

each case as authorized by sec. 5 of Rule 23 of the Supreme Court. The Appeals Court sitting in panels of three judges in each case, with one judge dissenting in each case, has denied jurisdiction under 28 U.S.C.A. § 1332(a) and has entered final judgments in each of the three cases.

OPINIONS BELOW

The opinions and dissents and judgments in the Fifth Circuit in each of the cases are not yet in the reports. For convenience, they are attached hereto as Appendices A, B and C, *infra*. The judgments in the trial courts are not in the reports, as far as is known (R. McIntyre, p. 25, Memorandum Decision, p. 33, and amended order, p. 35, Appendix D, *infra*; R. Hart, p. 22, Appendix E, *infra*; R. Aguirre, p. 17, and opinion, p. 20, Appendix F, *infra*).

JURISDICTION

The judgments of the Appeals Court in each of the three cases were entered June 20, 1962 (Appendices A, B and C). No motions for rehearing were filed. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Are the decisions of the majority in each of these three cases in conflict with the rule for determining jurisdiction as to amount in controversy laid down in *Horton v. Liberty Mutual Insurance Company, 6 L. Ed. 2d 890, 367 U. S. 348*, by this Court as claimed by the dissenters, Judge Rives and Judge Hutcheson?

2. In diversity actions, is the amount in controversy in a Federal District Court determined by the good faith allegations of the complaint, or by the amount of the claimant's counterclaim?

STATUTES INVOLVED

28 U.S.C.A. § 1332 in part:

> "§ 1332. Diversity of Citizenship; amount in controversy; costs.
>
> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs, and is between—
>
> "(1) Citizens of different states;"

Texas Civil Statutes, Vernon's Arts. 8307, sec. 5 (part relevant), Appendix G, *infra*; Art. 8306, sec. 10 (part relevant), Appendix H, *infra*.

STATEMENT

(McIntyre)

The Respondent, McIntyre, in his claim before the Texas Industrial Accident Board, alleged that he sustained general injuries on or about January 15, 1960 while working for Nome Supply Company at Nome, Texas [McIntyre R. 3, 12-Sec. II(2)]. His claim would have supported a recovery of $14,035.00 before said Board (See Art. 8306, Sec. 10, Vernon's Tex. Civ. Statutes, attached hereto as Appendix H);

The Texas Industrial Accident Board made an award of $330.15 [McIntyre R. 12-Sec. II(3)]. Petitioner, after giv-

ing proper notice (McIntyre R. 3), filed suit in the United States District Court at Beaumont, Texas on June 21, 1960, alleging that the amount in controversy was in excess of $10,000.00, exclusive of interest and costs (McIntyre R. 2-4), basing the jurisdiction of its suit on diversity of citizenship (McIntyre R. 2). The filing of the suit had the legal effect of setting aside the award of the Board (See Art. 8307, Sec. 5, Vernon's Tex. Civ. Statutes attached hereto as Appendix G).

After the filing of Petitioner's suit, the Respondent on June 23, 1960 filed suit in the District Court of Jefferson County, Texas, in which he sought to set aside the award of the Texas Industrial Accident Board, and alleged the amount of his damages to be $27.00 per week for a period of 401 weeks and $2000 medical expenses—a total of $12,827.00 (McIntyre R. 13-15), and which amount in controversy in the State Court has never been decreased (See McIntyre R.).

Respondent filed a motion in the Federal Court to dismiss Petitioner's suit for want of jurisdiction, and "subject" thereto an original answer and counterclaim in which he claimed $27.00 per week for a period of 100 weeks plus $21.00 per week for 300 weeks (McIntyre R. 17, 21). The federal trial judge granted the motion to dismiss and dismissed Petitioner's suit for want of jurisdiction (McIntyre R. 25, 35). Petitioner was then left in the State Court as defendant upon the same claim for workmen's compensation but in the amount of $12.827.00 (McIntyre R. 17-22).

Petitioner promptly perfected its appeals from said trial court's orders, and the United States Court of Appeals for the Fifth Circuit, by a divided court, affirmed the action of the trial judge, upon the theory that a correct interpretation of *Horton v. Liberty Mutual Ins. Co.*, 6 L. Ed. 2d 890, *affirming the Fifth Circuit's judgment in 275 F. 2d 148*, required the jurisdictional amount in such cases to be determined by the amount of Respondent's cross-action, rather than the good faith allegations made by Petitioner in the complaint (See Appendix A for opinion of the Court of Appeals and for Judge Hutcheson's dissent; and also see Appendix B attached hereto for opinion and dissent by Judge Rives in *Horace Hart v. United States Fidelity and Guaranty Company*).

Petitioner sincerely believes, with Justices Hutcheson and Rives, that Horton requires jurisdiction of the Federal Courts in such cases to be determined by the good faith allegations in the complaint rather than by the amount of the counterclaim, and within the proper time it seeks a writ of certiorari to correct the erroneous conclusion of the majority of the Fifth Circuit.

(Hart)

Respondent, Hart, alleged in his claim before the Texas Industrial Accident Board that he sustained a general injury (R. Hart 18) while employed by Wesco Materials Corporation in Dallas County, Texas, November 28, 1959. His claim would have supported a recovery before the Board of $14,-

035.00 (See Art. 8306, sec. 10, of Vernon's Texas Civil Statutes attached hereto as Appendix H).

The Board made an award of $910.00 (R. Hart 19). After giving proper notice (R. Hart 20), Petitioner filed suit in the Federal District Court at Dallas, Texas within the proper time (R. Hart 4) alleging that more than $10,000, exclusive of interest and costs, was the amount in controversy (R. Hart 5) basing jurisdiction on diversity of citizenship (R. Hart 4, 5). Filing of the suit had the effect of setting aside the award of the Board (See Art. 8307, sec. 5, Appendix G).

Respondent moved to dismiss for want of jurisdiction and filed a counterclaim for $6310.00 (R. Hart 9-15).

Although Respondent claimed in his pleadings in the Federal Court that less than $10,000 was involved, he waived all claims as to lack of jurisdiction and demanded a trial (R. Hart 22). As a result of a trial to a jury, Respondent was awarded $1224.00 (R. Hart 24). Respondent also filed a motion for new trial in which he challenged the jurisdiction of the court but then voluntarily withdrew any presentation of the motion to the trial court (R. Hart 26, 29 and 30).

Under Supreme Court Rule 20, Respondent applied for a writ of certiorari to this Honorable Court while his appeal was pending in the Court of Appeals. Respondent's counsel at that time had a motion for rehearing pending in this Honorable Court in *Horton v. Liverty Mutual Ins. Co., 6 L. Ed. 2d 890*, and in this manner sought simultaneous and joint consideration of both cases. Both his application in

Hart v. United States Fidelity and Guaranty Company (No. 372), *7 L. Ed. 2d 95*, and his motion for rehearing in *Horton* were denied, *7 L. Ed. 2d 70 (Oct. 1961)*.

Respondent then returned to the United States Court of Appeals for the Fifth Circuit, from which Court he obtained, by a divided court, a reversal of the judgment below founded upon the contention that a correct interpretation of *Horton v. Liberty Mutual Ins. Co., 6 L. Ed. 2d 890, affirming the Fifth Circuit itself, 275 F. 2d 148*, required jurisdictional amount in such cases to be determined by the amount of the counterclaim rather than by the good faith allegations of the complaint (See Appendix B for opinion of the Court and Judge Rives' dissent. See also Appendix A attached hereto for supporting opinion and dissent in *Hardware Mutual Cas. Co. v. McIntyre*—handed down at the same time in which Judge Hutcheson dissented and upon which disposition of Hart by the majority is based).

Petitioner, United States Fidelity and Guaranty Company, files this petition for writ of certiorari within the proper time challenging the correctness of this ruling.

(Aguirre)

September 26, 1961, Petitioner, Standard Accident Insurance Company, on the basis of undisputed diversity, after giving proper notice (R. Aguirre 2, 3, 18) and within the proper time, instituted this suit in the Federal District Court for the Western District of Texas at San Antonio, Texas, alleging that more than $10,000 was the amount in controversy (R. Aguirre pp. 1 to 3). *Aguirre had claimed*

$14,035 before the Board (R. Aguirre pp. 17, 18). After the suit had been filed in the Federal Court, *Aguirre filed suit in the State Court claiming $14,035* (R. Aguirre p. 18). However, in his counterclaim in the Federal Court, Aguirre only claimed $8750 (R. Aguirre p. 18). He also moved to dismiss the federal court suit for want of jurisdiction (R. Aguirre pp. 4, 18). This motion was granted (R. Aguirre p. 17).

Appeal to the United States Court of Appeals for the Fifth Circuit was duly perfected by the insurance carrier. By a divided court, that Court has affirmed the trial court's order of dismissal (Appendices C and A). This Petition for Writ of Certiorari is filed within the time permitted by law to test the propriety of this ruling.

REASONS FOR GRANTING THE WRIT

SUMMARY

Certiorari should be granted because the majority of the Court of Appeals for the Fifth Circuit has decided an important question of federal jurisdiction in conflict with the recent holding of this Court in *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348, 6 L. Ed. 2d 890 (1961)* and with its own holding in *Liberty Mutual v. Horton, 275 F. 2d 148.* Judges Rives and Hutcheson, both of whom participated in the *Horton* case, dissented on the ground that the majority's holding "goes directly counter to the holding of the Horton cases."[1] The majority of the Court of Appeals based federal

[1] See Judge Hutcheson's dissent, Appendix A-12. Also, Judge Rives' dissent, Appendix B-3.

jurisdiction solely on the amount sought in the counterclaim filed in federal court instead of on the allegations set forth in the complaint, as required by *Horton v. Liberty Mutual.*

This failure to follow the *Horton* decision allows the claimant to defeat federal jurisdiction at will by formal allegations in his counterclaim that less than $10,000.00 is involved. It makes no difference that at the same time a state court suit is pending in which he is actively seeking a sum in excess of $10,000.00.[2] This Honorable Court recognized the importance of maintaining a definite and stable rule for determining federal jurisdiction when it decided the *Horton* case. The majority of the Fifth Circuit refuses to follow such rule.

I. The majority of the Fifth Circuit erred in its interpretation of *Horton v. Liberty Mutual* when it held that the counterclaim, instead of the complaint, determines federal jurisdiction.

A. *Analysis of Horton v. Liberty Mutual.*

Petitioners agree with the majority to the extent it said, "Any analysis of the problem herein involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Company*, 367 U. S. 348."

In the *Horton* case, the claimant specifically sought $14,035.00 before the Industrial Accident Board, $14,035.00 in his federal counterclaim and $14,035.00 in his suit pending

[2] See Judge Hutcheson's dissent, Appendix A-12. Also, Judge Rives' dissent, Appendix B-3.

in the State court. The Court of Appeals for the Fifth Circuit in their decision of *Liberty Mutual v. Horton, 275 F. 2d 148*, held that the amount in controversy is determined according to Texas law; but, in the alternative, jurisdiction would exist under the general federal rule, based on the good faith allegations in the complaint. When this issue was decided by this Honorable Court, it was decided on the identical basis as the alternative opinion of the Fifth Circuit and the same cases were cited. In analyzing this Honorable Court's opinion in *Horton*, the governing portion thereof at *p. 894 L. Ed. 2d*, can be broken down into three important statements:

(1) "Determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards." State law is to be looked to only to determine the nature and value of the rights involved. (2) "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith, we have said that it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.'" (3) *In applying the "general federal rule" to the facts* before the Court in *Horton*, the Court concluded "* * * there has been no other showing, let alone a showing to a legal certainty, of any lack of good faith *on the part of the respondent* (insurer) in alleging that a $14,035.00 claim is involved." (Emphasis and parentheses added.) This indicates that the

Court was applying the general federal rule, which it had just stated, to the facts then before it.

By focusing solely on the Supreme Court's discussion of the facts involved in *Horton* and ignoring the *rule* stated, the majority of the Court of Appeals concluded that the amount sought in the counterclaim was the *sole test* of federal jurisdiction. Thus, it concluded, if the counterclaim is for less, jurisdiction, even though at first present, automatically vanishes. The majority of the Fifth Circuit does *not* say that the amount asserted in the counterclaim determines the good faith or bad faith of the allegations in the complaint. It does *not* say that the lesser amount placed in the counterclaim establishes lack of good faith in the complaint to a "legal certainty". Such a statement would be unrealistic and unfair, but would be within the limits of the "general federal rule" announced in *Horton*. Instead, the Court adopted a *new, untested, and untried rule* for determining federal jurisdiction based upon the idea that the counterclaimant is the *real plaintiff*, and cites *Horton* as supposed authority for the new rule. Having ventured this far afield, the Court then proceeds to discard completely and without discussion any requirement of good faith on the part of the counterclaimant. Under the majority's rule, no amount of evidence indicating bad faith on the part of the counterclaimant could prevent the federal court from dismissing for lack of jurisdiction. No better illustration of this can be found than in *McIntyre*, where a claim for $12,827.00 has been pending in the State Court all along. Horton plainly did not establish this rule

This error is concisely pointed out by Judge Rives in his dissent in Hart v. U. S. F. & G. Co., Appendix B-3.

and the majority was unable to cite a single case that did. The rules set out in *Horton* were taken from *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U. S. 283, 288, 82 L. Ed. 845, 848, 58 S. Ct. 586; Bell v. Preferred Life Assur. Soc., 320 U. S. 238, 240, 88 L. Ed. 15, 17, 64 S. Ct. 5;* and *Aetna Casualty & S. Co. v. Flowers, 330 U. S. 464, 468, 91 L. Ed. 1024, 1027, 67 S. Ct. 798*, all of which were cited in the opinion. To interpret *Horton* as basing jurisdiction on the counterclaim, as done by the majority, is to declare that the Supreme Court followed its previous holdings in one sentence and overruled them two sentences later.

B. *Reduction of Claim or Counterclaim Cannot Defeat Federal Jurisdiction.*

Attempts to defeat federal jurisdiction by artful pleadings are not new. *St. Paul Mercury v. Red Cab*, supra, was a case in which a state court plaintiff attempted to reduce his claim to below the jurisdictional amount after the case had been removed to the federal court. After holding that such reduction would not oust federal jurisdiction, the court said at page 294, U. S. 303:

> "We think this well established rule is supported by ample reason. If the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat Federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election."

If the facts of the *Red Cab* case were presented to the majority of the Fifth Circuit, to be consistent, it would say as it did in *McIntyre*, that upon reduction of the state court plaintiff's claim after removal to the federal court "* * * it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances can the insured recover more than $10,000.00 in the suit. This being so, there is no Federal jurisdiction." (Appendix A at page A-8.) The principle in both cases is the same. This illustrates about the only moment of wisdom displayed by the majority when it admitted that its ruling "depart(s) from traditional notions of pleading Federal jurisdiction * * *." (Taken from the majority opinion in *McIntyre*, Appendix A at page A-7.) The comments in the *Red Cab* case illustrate the sound reasoning behind the rule set forth at page 289 therein that "events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."

Chief Justice Marshall in *Mollar v. Toran, 9 Wheat. 537, 539, 6 L. Ed. 154, 155*, said, "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events". So well established is this rule that even if the pleadings indicate a valid defense to the claim, federal jurisdiction is not defeated. *St. Paul v. Red Cab*, at p. 289. In fact, where the complaint as filed in the state court states an amount in controversy sufficient to confer jurisdiction upon the federal court and after removal

to the federal court the complaint is dismissed, the Federal Court, nevertheless, retains jurisdiction of a counterclaim below the jurisdictional amount. *Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 L. Ed. 911,* and cases cited therein. Judge Rives correctly points out in his dissent that the majority has abandoned "the long-established logical doctrine that jurisdiction must exist from the time it is first invoked, that is, when the suit is filed." (Appendix B-4.)

II. Federal jurisdiction is determined by the amount in controversy as alleged in the complaint unless it is shown that the allegations are not made in good faith. *Horton v. Liberty Mutual,* supra.

This is the interpretation placed on *Horton v. Liberty Mutual* by dissenting Judge Rives and Hutcheson (Appendices A-12, B-3. This is also the interpretation placed on *Horton* by Professor Bickel in *75 Harv. L. Rev. 168, 170,* where he concluded, "But since under Texas law the insurer was seeking to avoid a possible $14,035.00 liability, its complaint, without reference to any possible counterclaim, put the requisite amount in controversy."

A. *Amount in controversy as alleged in the complaint is the maximum potential liability of the insurer.*

The complaints filed in all three cases indicated that the insurers each felt that a potential liability in excess of $10,000.00 existed. In each case, they had faced such a potential liability before the Industrial Accident Board. It has been consistently held when a party sued to be relieved

of a contractual obligation, statutory regulation, or taxation, that his maximum potential liability determined the amount in controversy. The value of this potential liability is tested by the value of the right to be free from the tax, the statute or the claim. *McNutt v. General Motors, 298 U. S. 178, 80 L. Ed. 1135; Gibbs, v. Buck, 307 U. S. 66, 83 L. Ed. 1111; Packard v. Banton, 264 U. S. 140, 142, 68 L. Ed. 596, 607; City of Memphis, Tenn. v. Ingram, 195 F. 2d 338.* When suit is brought by an insurance company in a federal court to rescind a policy, to declare its rights thereunder, or to enjoin a State court proceeding, the amount in controversy is the maximum potential liability of the company. *Ballard v. Mutual Life Ins. Co. of N. Y., 109 F. 2d 388; Mutual Benefit Health & Acc. Assoc. v. Fortenberry, 98 F. 2d 570; Hartford Acc. & Indem. Co. v. Northwest Nat. Bank, 228 F. 2d 391; N. Y. Life Ins. Co. v. Swift, 38 F. 2d 175.*

The rule announced by the majority would look *only* to the potential liability of the company as stated in the counterclaim in the federal court proceeding. A similar narrow and unrealistic viewpoint was rejected in *Red Cab. Horton* looked at the "whole record", including the claim before the Board and the amount claimed in the State court suit. The court in *Horton* concluded: "No matter which party brings it into Court, the controversy remains the same: it involves the same amount of money. * * *." In contrast, the majority rule in the cases at bar leaves determination of the amount in controversy to the discretion of the claimant, who can

change it from time to time in the various proceedings depending on the result desired at the moment. As a matter of right, the claimant may amend in the State court to claim more than $10,000. See *Booth v. Texas Employers, 123 S. W. 2d 322*, Point 13 (Opinion adopted Sup. Ct. of Texas).

Petitioners do not take the position that *Horton* held that the amount claimed before the Industrial Accident Board automatically determines federal jurisdiction, but certainly the claim, together with the Texas compensation law, must be looked to "to determine the nature and extent of the right * * *" sought to be protected, as stated in *Horton*. The majority has declined to recognize this method of determining the amount in controversy.

B. *Good Faith.*

The *Horton* case stated and followed the rule that the allegations in the complaint fix jurisdiction unless it is in some way shown that they are not made in good faith. In contrast, the majority dispenses with good faith, thus allowing the counterclaimant to reduce his claim in federal court and simultaneously, or subsequently, sue for $14,035.00 in the State court. The *McIntyre* case vividly illustrates this point. In that case, the fact that the counterclaimant was seeking more than $10,000.00 in the State court appears to be the strongest evidence of a lack of good faith on *his* part. It also verifies the good faith of the allegations in the com-

plaint.[4] Undoubtedly, the majority viewed the problem it was creating more realistically than it indicated in its opinion, and dispensed with good faith on the part of the counterclaimant simply because *under its rule, there is no way good faith can be required of the counterclaimant.* This occurs because he is free to increase the amount of his demand in the State court after federal jurisdiction is dismissed. Thus, a claimant more subtle than *McIntyre* will seek less than $10,000.00 in his counterclaim in the Federal Court and less than $10,000.00 in the State Court *until federal jurisdiction is dismissed* and then amend asking for the full $14,035.00. The fact that he previously claimed less can be explained away to the satisfaction of a jury in countless ways. It is thus obvious that the good faith or bad faith of the counterclaimant can seldom be determined until federal jurisdiction is *lost*. It is submitted that the majority must have had these obvious facts in mind when it eliminated from its new rule any requirement of good faith on the part of the counterclaimant—real plaintiff.

As illustrated by the Fifth Circuit's attempt to place jurisdiction solely on the counterclaim, attempts to determine federal jurisdiction with mathematical-like precision from the pleadings *only* will make such jurisdiction com-

[4]There is no finding in any of these cases by the courts below that good faith of the insurance carrier was non-existent. In Hart, Respondent waived all objections to jurisdiction, demanded trial which was accorded him, and waived any challenges to good faith. At the time Aguirre claimed only $8,750 in his counterclaim in federal court, he was simultaneously suing for $14,035 in the state court (R. Aguirre p. 18).

pletely artificial. A good faith requirement was included in the "general federal rule" for this very reason. This question of good faith can and should be gone into at a pre-trial hearing in accordance with Rule 12(b) and (d). Concerning this point, it was said in *Firemen's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 784:* "Such a rule (that a valid defense in diminution of the amount claimed does not necessarily diminish the amount that is or may be claimed in good faith by the Plaintiff), does not contravene another well settled rule that the court has the power to determine in every case whether the prerequisites to jurisdiction in fact exist and such jurisdictional issues are properly triable to the court prior to a trial on the merits. Rule 12(b) and (d), Rules of Civil Procedure, 28 U.S.C.A. The manner in which such a determination should be made is left to the trial court. *Gibbs v. Buck*, 307 U. S. 66, 76, 59 S. Ct. 725, 83 L. Ed. 1111. The court may inquire by affidavits or otherwise into the facts as they exist. It is not, however, a hearing upon the merits. *Land v. Dollar, 330 U. S. 731, 735, note 4, 67 S. Ct. 1009, 91 L. Ed. 1209.*" At this hearing, the trial court can examine previous claims, medical evidence, prior settlement offers, the nature of the injury, and the claim before the Board, to determine the good faith of the alleged controversy. The very function of the pretrial procedure is to eliminate superfluous and unreal issues. It is the same with regard to jurisdictional questions. In view of this procedural safeguard, there is no basis for any apprehension

that the federal courts will be inundated with trivial workmen's compensation cases.

CONCLUSION

In deciding *Horton* this Court evidently felt satisfied with the rule that good faith allegations in the complaint should determine the amount in controversy for jurisdictional purposes in the federal court. Its holding in *Horton* will be completely frustrated if the majority opinions in the cases at bar are allowed to stand as the official interpretation of *Horton*. This will produce a chaotic condition in the important matter of federal court jurisdiction. Its effect will not be restricted to workmen's compensation cases but will reach to many other types of cases. The real necessity for granting writs of certiorari in the cases at bar stems from the reality that unless the erroneous interpretation of *Horton* is corrected, hereafter federal jurisdiction will turn upon fictitious pleadings asserted in a counterclaim. The damage this will do to the prestige and dignity of federal courts is incalculable.

For these and the foregoing reasons petitioners pray that this Petition for Writs of Certiorari be granted and that the judgments of the majority of the Fifth Circuit in each case be summarily reversed as being in conflict with *Horton* (See Judge Hutcheson's dissent, Appendix A-12). In the alternative, that the writs be granted and that upon final hearing, the judgments of the majority of the Fifth Circuit be reversed. Petitioners in *McIntyre* and *Aguirre* pray that the trial courts' judgments of dismissal also be reversed and

Petitioner in *Hart*, that the judgment of the trial court be affirmed. They pray for all costs of suit and such other relief as they may show themselves entitled to.

Respectfully submitted,

JOHN H. BENCKENSTEIN,
P. O. Box 551,
Beaumont, Texas,
Attorney for Hardware Mutual Ins. Co.

D. D. CRAWFORD,
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Dallas, Texas,
Attorneys for United States Fidelity and Guaranty Company.

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RICHARD TINSMAN,
911 Frost National Bank Bldg.,
San Antonio, Texas,
Attorneys for Standard Accident Ins. Co.

By Reo Knowles
Of Counsel

AFFIDAVIT OF SERVICE

I, Reo Knowles, of counsel for Petitioners, do hereby certify that service of copies of the foregoing Petition for Writs of Certiorari has been made on each of Respondents by mail in accordance with Rule 33 of the Rules of this Court.

Dated this 9th day of August, 1962.

Reo Knowles
REO KNOWLES,
Of Attorneys for Petitioners.

APPENDICES

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18557

(R. McIntyre 44)

HARDWARE MUTUAL CASUALTY COMPANY,
Appellant,

versus

ADAM McINTYRE,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(June 20, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and JONES, Circuit Judges.

TUTTLE, Chief Judge: The single question presented by this appeal is whether the District Court properly dismissed appellant's suit for want of jurisdiction on the ground that the matter in controversy, exclusive of interest and costs, did not exceed the sum of $10,000 as required by 28 U.S.C.

§1332. For the reasons hereafter stated, we affirm the judgment of the District Court.

On January 15, 1960, the appellee, Adam McIntyre, a resident of Texas, was injured while working for his employer in Nome, Texas. The employer's compensation carrier under the Texas Workman's Compensation Law was the appellant, Hardware Mutual Casualty Company, a Wisconsin corporation. On February 25, 1960, the appellee filed a claim with the Texas Industrial Accident Board in which he simply described the circumstances surrounding his injury did not request a specific amount of compensation.[1]

On June 20, 1960, the Board awarded the appellee compensation in the amount of $22.01 per week for 15 consecutive weeks commencing January 16, 1960, or a total of $330.15.

The very next day, the appellant filed this suit to "set aside" the award. The complaint alleged generally that the matter in controversy exceeded $10,000, and specifically, that:

> "The claim filed by the defendant for compensation with the Industrial Accident Board of Texas is for total and permanent incapacity . . . and although the claim for compensation is not set out with particularity [with respect to] the amount of money [claimed] . . . [the] amount fixed by law for compensation [for total and permanent incapacity] is a sum which is within the jurisdiction of this Court; . . . ."

[1] Appellee's claim stated simply that "while he was jacking up a tractor, the jack leg fell, causing the tractor to fall on his left shoulder and right leg." On March 15, 1960, the appellee amended his claim to state the following: "I was taking a wheel off a tractor and it fell on me, breaking my left clavicle and injuring my left shoulder, back and side and causing general injuries to my body."

The source of appellant's dissatisfaction with the award is revealed in the following allegation of the complaint:

> "The plaintiff paid defendant compensation until on or about the 15th day of April, 1960, and suspended and stopped the payment of same because the claimant was then capable and able to do the same type of work as before his alleged injuries and plaintiff so advised the Industrial Accident Board of the State of Texas to such effect and plaintiff is now claiming and does claim that defendant is not entitled to recover for compensation from plaintiff or in the amount as shown and set forth in the above mentioned award of the Industrial Accident Board of Texas. The defendant has been paid for his temporary total incapacity and plaintiff denies that defendant has any residual disability or any loss of earning power or any loss of wage earning capacity."[2]

The complaint prayed for judgment "setting aside" the award and that the appellee "be denied any and all relief by way of compensation."

On July 13, 1960, the appellee moved to dismiss the complaint for want of jurisdiction, alleging that he did not claim "total and permanent incapacity" before the Board, that he did not claim compensation in excess of $10,000 before the Board, and that the amount in controversy thus did not exceed $10,000. On the same day, the appellee filed his answer to the complaint, which contained essentially the same allegations as were contained in his motion to dismiss. The answer further alleged that the appellee "sustained some total disability but that said total disability was not permanent." Also on July 13, 1960, the appellee filed a counterclaim

[2] In other words, the appellant claims that the award gave the appellee $44.02 too much.

against the appellant wherein he claimed total disability for 100 weeks and partial disability for another 300 weeks. The counterclaim prayed for judgment in the sum of $27 per week for 100 weeks and $21 per week for 300 weeks, or a total of $9,000.

Prior to July 13, 1960, and on June 23, 1960, the appellee had filed a civil action against the appellant in a Texas state court wherein he alleged total disability for 401 weeks. The complaint in the state court prayed for judgment in the sum of $27 per week for 401 weeks plus $2,000 medical expenses, or a total of $12,827.

On August 15, 1960, the District Court granted appellee's motion to dismiss on the grounds (1) that the appellee had not claimed compensation in excess of $10,000 before the Texas Industrial Accident Board and (2) that the appellee had not sought to recover a sum in excess of $10,000 in the instant suit.

Any analysis of the problem here involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U. S. 348. That case, as this one, concerned a suit by an insurer to "set aside" an award of the Texas Industrial Accident Board. The award in that case was $1,050. The injured workman had claimed $14,035 before the Board, had instituted a suit in a state court for $14,035, and had counterclaimed in the federal action for $14,035. The Court upheld the jurisdiction of the district court in the following language:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of fed-

eral jurisdiction is a federal question to be decided under federal standards, although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board.

"The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." In deciding this question of good faith we have said that it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035; which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. *No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy.* It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035 claim open for adjudication in a *de novo*

> court trial, regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000. (Emphasis added)

One thing appears clearly from the foregoing language; and that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to "set aside" the award. This is because the mere filing of suit by the insurer absolutely nullifies the award, so that its amount can never be said to be "in controversy" in the action. Indeed, the mere mention of the nature or amount of the award during the trial has been held to be prejudicial error by the Texas Courts. *Fidelity Union Casualty Co. v. Klatt*, 47 S. W. 2d 417.

We interpret Horton to prescribe the following test for determining whether federal jurisdiction exists when an insurer brings suit to "set aside" an award of the Texas Industrial Accident Board: If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to "set aside" the award, federal jurisdiction exists *unless* the insured denies the allegation that he will seek more than $10,000 in the court action and makes an affirmative claim for compensation for a sum which does not exceed $10,000.

We realized of course, that such a rule gives the insured the power to defeat federal jurisdiction simply by asserting a claim for less than $10,000 after he is brought into court by the insurer. But, however much this may depart from traditional notions of pleading federal jurisdiction, the procedure for "setting aside" an award established by the Texas Compensation Law leaves no satisfactory alternative. The Texas Compensation Law permits any interested party, including, of course, the insurer, to bring suit to "set aside" the award of the Industrial Accident Board. As noted previously, however, once such an action is commenced, the award becomes an absolute nullity under the Texas statute. The filing of the suit, in and of itself, abrogates the award, and this is so even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. See *Zurich General Accident Co. v. Rodgers*, 97 S. W. 2d 674; *Texas Reciprocal Ins. Ass'n. v. Léger*, 97 S. W. 2d 677. The insurer is under no obligation to prove that the award was erroneous, even though the insurer's action is designated as an action to "set aside" the award. To the contrary, once an action such as this is filed, a trial *de novo* is conducted, and the burden is on the *insured* (here, the defendant) to plead and prove whether and to what extent he is entitled to compensation. Thus, when the insurer institutes such an action, it is a "plaintiff" in name only. The filing of suit by the insurer is nothing more than a notice to the insured to come into court and prove his claim.

Thus it is that the amount actually in controversy in the action cannot be determined until the insured responds to

this notice by filing a claim for compensation against the insurer. The insured's "counterclaim" is, for all intents and purposes, the *only* claim involved in the action. If the insured asserts a claim for compensation for a sum which does not exceed $10,000, it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances, can the insured recover more than $10,000 in the suit. This being so, there is no federal jurisdiction.

The appellant argues that the amount in controversy can best be determined by looking to the amount claimed by the insured before the Industrial Accident Board. For one thing, it does not appear that the test suggested by the appellant was adopted by the Supreme Court in Horton. For another, assuming the question was an open one, we think the rule proposed by the appellant has little to recommend it.

In Horton, the Supreme Court specifically noted that we are not bound by the Texas rule which, in certain cases, provides that the amount in controversy is fixed by the amount claimed by the insured before the Industrial Accident Board. After so noting, the Court did not say that we should adopt this rule as a matter of federal law. Rather, the Court went to some lengths to point out that the insurer in that case had alleged that the insured had claimed and *would claim* in excess of $10,000, and that the insured had made "no denial of these allegations." If the Court had meant to adopt the test urged by the appellant here, it could have done so in plain and simple language. In that event, we think, the opinion would not have emphasized, as it did, that

the *insured* was vigorously asserting a claim for compensation for a sum exceeding the jurisdictional amount. In short, we do not think that the majority opinion in Horton is fairly susceptible to the interpretation which the appellant places upon it.

Moreover, it seems to us that the rule proposed by the appellant has at least two serious shortcomings. First of all, the Texas Compensation Law does not require an insured to claim a specific sum of money before the Industrial Accident Board; nor does it even require him to state sufficient facts from which the amount claimed can be definitely be determined. *Booth v. Texas Employers' Ins. Ass'n*, 123 S. W. 2d 322. Thus, if the rule suggested by the appellant was adopted, it would be impossible to fix the amount in controversy in a case where the insured did not claim a specific sum before the Board and did not state sufficient facts from which the amount claimed could be determined. Since the latter situation is apparently of common occurrence, appellant's suggested test would have rather limited utility.

Secondly, the Texas law is clear that the insured is not ordinarily bound by the amount which he claims before the Board. Where, as here, the claim is for general injuries suffered, the insured, in a court action to "set aside" the award, can increase the amount of his claim to include compensation for all injuries proximately resulting from the accident. *Booth v. Texas Employers' Ins. Assn, supra.* Similarly the insured can reduce the amount of his claim if he sees fit to do so. Thus, the amount of the claim before the Board is

hardly a reliable indicator of the amount actually in controversy in the federal court action.

The appellant contends that it would be unfair to permit the insured to defeat federal jurisdiction by claiming less than the jurisdictional amount in the action, since the insured would then be free to assert a claim for more than $10,000 in a state court action and the insurer would be unable to remove to a federal court because of the Congressional ban on the removal of state workman's compensation cases. See 28 U.S.C. §1322. Of course, the simple answer to this is that, regardless of any possible unfairness a federal court does not have jurisdiction in a diversity case unless the amount in controversy exceeds the sum of $10,000. Appellant's argument would be equally applicable, and equally unavailing, in numerous other cases where the amount in controversy does not reach the federal standard. For example, suppose a plaintiff brought suit against a defendant for $5,000 and alleged that the defendant had a compulsory counterclaim against the plaintiff for $15,000. Certainly, the defendant would be entitled to have the case dismissed for want of jurisdiction, even though the defendant could then bring suit for $15,000 in a state court and the case could not be removed because the suit was commenced in the original plaintiff's home district. However real the possibility of losing and opportunity to have the case tried in a federal court, it cannot vitiate the fact that the amount in controversy in an action such as the instant one is the amount claimed by the insured in the action and that, where the amount there claimed does not exceed $10,000, the federal

standard has not been met. We might note, on the other hand, that if an insured subsequently sues in a state court for more than $10,000, he would probably have some difficulty overcoming the effect of his previous judicial admission that he was not entitled to more than $10,000. This may well afford all the protection the insurer needs.

In the present case, it appears that the appellee did not claim more than $10,000 before the Industrial Accident Board and that he counterclaimed for $9000 in the action commenced by appellant. The District Court, in a decision rendered before the Supreme Court's decision in Horton, dismissed the appellant's action on both the above grounds. For the reasons heretofore stated, we think dismissal was justified on the sole ground that the appellee's claim in the action was for less than $10,001. The judgment is, therefore,

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

I would simply "reverse on the authority of the *Horton* cases." As I read these cases, which are controlling here, it is quite plain that Judge Fisher's holding in this case, that federal jurisdiction did not exist, is not supported by the holding in those cases, that *the claim of the insurance carrier determines federal jurisdiction unless the amount in controversy stated by it is found to a legal certainty to be not stated in good faith.* Judge Fisher's finding in this case that, though the plaintiff sued in the state court for $12,827, he could, by limiting his counter-claim in federal court to $9000, defeat the jurisdiction as asserted in the insurer's *suit, in my opinion, goes directly counter to the holding of the Horton cases,* and his judgment must be reversed, not affirmed.

I respectfully DISSENT from the opinion of the majority.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

By CLAIR R. JAMES
Dy. Clerk

[Seal] Aug 2 1962

JUDGMENT.

Extract from the Minutes of June 20, 1962

No. 18557
(R. McIntyre 56)

HARDWARE MUTUAL CASUALTY COMPANY

versus

ADAM MCINTYRE

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Hardware Mutual Casualty Company be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, Dissents."

* * * * *

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19184

(R. Hart 41)

HORACE HART,

Appellant,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(June 20, 1962)

Before RIVES, CAMERON and GEWIN, Circuit Judges.

CAMERON, Circuit Judge: The facts of this case bring it within the ambit of the decision of this Court in *Hardware Mutual Casualty Co. v. Adams McIntyre*, May, 1962, F. 2d . The facts in this case are these:

The appellee United States Fidelity and Guaranty Company, a compensation carrier of the employer of the appellant

Horace Hart, inistituted this diversity action to set aside a $910.00 award to appellant by the Texas Industrial Accident Board covering personal injuries growing out of appellant's employment. The complaint alleged that the amount in controversy exceeded $10,000.00. The appellant-employee moved to dismiss for want of jurisdictional amount, specifically denying in his answer that the amount in controversy exceeded $10,000.00, and filing a counter-claim for damages in the sum of $6,310.00. The appellant-employee, *pro se*, had filed a general claim for compensation with the Board for an injured back, but he did not claim more than $10,000.00 or any specific amount.

On the day of trial, June 12, 1961, the appellant consented to the exercise of jurisdiction of the court below,[1] and the trial proceeded, resulting in a judgment in favor of the appellant for $1,224.00, and costs, plus $385.00 previously paid under the maximum compensation rates. The appellant Hart had also filed suit in a state court of Texas to set aside the Board's award in which he demanded damages in the sum of $6,310.00 compensation, which suit is still pending. The appellee-insurer filed a plea in abatement in the state suit on the ground that this action was already pending in the court below.

The appellant-employee duly perfected his appeal to this Court. Prior to the judgment of this Court the appellant-employee filed a petition for writ of certiorari to the Supreme

[1]The waiver of jurisdictional amount by the appellant has no validity, it being settled that jurisdiction may not be conferred by consent, Kelly v. Hartford Accident & Indemnity Co., 5 Cir., 1961, 294 F. 2d 399, 409; People's Bank v. Calhoun, 102 U. S. 256; American Fire and Casualty Co. v. Finn, 351 U. S. 6.

Court of the United States. The Supreme Court denied certiorari on November 16, 1961, *Hart v. United States Fidelity and Guaranty Co.*, 368 U. S. 899.

Based upon the decision of this Court in the case of *Hardware Mutual Casualty Co. v. Adam McIntyre, supra*, the judgment here before us is reversed and the case is remanded to the district court for the entry of judgment dismissing this action on the ground that the statutory amount is not in controversy.

REVERSED AND REMANDED.

RIVES, Circuit Judge, dissenting:

With deference to my brothers of the majority, I agree with Judge Hutcheson's view[1] as to the teaching of the Supreme Court's opinion in *Horton v. Liberty Mutual Ins. Co.*, 1961, 367 U. S. 348.[2] The most significant passage in that opinion, I think, is:

> "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that

[1] See Judge Hutcheson's dissent in Hardware Mutual Casualty Company v. McIntyre, 5 Cir., No. 18557, also decided today.

[2] It is interesting to note, however, that Judge Jones, the third member of the panel which decided the Horton case in this Court, see 275 F. 2d 148, is aligned with the present majority.

the claim is really for less than the jurisdictional amount to justify dismissal."[3]

> "[3]*Id., at 289* [*St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283]. See also *Bell v. Preferred Life Assurance Society*, 320 U. S. 238, 240; *Aetna Casualty Co. v. Flowers*, 330 U. S. 464, 468."

Chief Judge Tuttle for the majority emphasizes the following sentence:

> "No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing 'to a legal certainty,' of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy."[3]

To me that sentence and other similar parts of the opinion mean no more than that the Court was properly pointing to *facts in the case then before it* which established "good faith" beyond question. There was no suggestion that such extreme facts were essential to the Court's holding. The expression ". . . let alone a showing 'to a legal certainty' " clearly indicates that they were not so essential. To read the opinion otherwise would mean to abandon the long-established logical doctrine that jurisdiction must exist from the time it is first invoked, that is, when the suit is filed, and is to permit jurisdiction to remain "tentative" or in limbo subject to the arbitrary determination of the claimant as to the amount which he will seek to recover by his counterclaim. Candid recognition of that incongruity may be detected in Judge Tuttle's opinion for the majority: "But

[3]Hardware Mutual Casualty Co. v. McIntyre, 5 Cir., No. 18557, also decided today.

however much this may depart from traditional notions of pleading federal jurisdiction . . ."

If Judge Hutcheson and I are right in our view of the teaching of the *Horton* opinion, there is no such departure "from traditional notions of pleading federal jurisdiction." That much is clearly explained by the annotation in 75 Harvard Law Review 170:

> "But since under Texas law the insurer was seeking to avoid a possible $14,035.00 liability, its complaint, without reference to any possible counterclaim, put the requisite amount in controversy."

I respectfully dissent.

---

[1] St. Paul Mercury Indemnity Co. v. Red Cab Co., 1938, 303 U. S. 283, 292; Taylor v. Anderson, 1914, 234 U. S. 74, 75-76; Smithers v. Smith, 1907, 204 U. S. 632, 643; Kirby v. American Soda Fountain Co., 1904, 194 U. S. 141, 145-146; Gulf Refining Co. v. Price, 5 Cir., 1956, 232 F. 2d 25, 36.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,184
(R. Hart 46)

D. C. Docket No. 8527 Civil

HORACE HART,

Appellant,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before Rives, Cameron and Gewin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for the entry of judgment dismissing this action on the ground that the statutory amount is not in controversy;

It is further ordered and adjudged that the appellee, United States Fidelity and Guaranty Co., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissenting."

June 20, 1962

Issued:

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19127

(R. Aguirre 30)

STANDARD ACCIDENT INSURANCE COMPANY,
Appellant,

versus

MARCOS V. AGUIRRE, JR.,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(June 20, 1962)

Before TUTTLE, Chief Judge, RIVES and Jones, Circuit Judges.

PER CURIAM: This case is similar to *Hardware Mutual Casualty Company v. McIntyre* decided this same day by this Court, Docket No. 18,557. The question involved here is whether the District Court properly dismissed the appellant insurer's suit to "set aside" an award made to the appellee by the Texas Industrial Accident Board on the ground that the amount in controversy did not exceed $10,000.

The following facts are undisputed: The appellee, having been injured in the course of his employment, filed a claim for compensation with the Industrial Accident Board in the amount of $14,035, the maximum compensation allowable under Texas law. The Board's award was for $146.65. The appellant, the compensation carrier of the appellee's employer, then brought this suit to "set aside" the award, asserting that the amount in controversy exceeded $10,000. The appellee denied the jurisdictional allegation, and asserted a claim against the appellant for $8,750.00. The appellee also moved to dismiss for want of jurisdiction, which motion was granted by the District Court.

Thus stated, the facts of this case bring it within the rule enunciated in *Hardware Mutual Casualty Company v. McIntyre*, 5 Cir., F. 2d . We there held that, in a suit by an insurer attacking an award made by the Texas Industrial Accident Board, the amount in controversy is fixed by the amount claimed by the *insured* in the suit. Since the appellee-insured in the instant case made claim for $8,750, it follows that the amount in controversy requirement was not satisfied and that the District Court was, therefore, correct in dismissing the suit for want of jurisdiction.

AFFIRMED.

RIVES, Circuit Judge, dissents, his dissenting opinion appears in No. 19184, *Horace Hart v. United States Fidelity and Guaranty Company.*

C-3

No. 19127
(R. Aguirre 37)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY

v.

MARCOS V. AGUIRRE, JR.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Standard Accident Insurance Company, and the surety on the appeal bond herein, Great American Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissents."

* * * * *

APPENDIX D

No. 4327
(R. McIntyre 25)

In the District Court of the United States for the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

ORDER SUSTAINING MOTION TO DISMISS AND DISMISSING CAUSE FOR WANT OF JURISDICTION

BE IT REMEMBERED that on the 15th day of August, 1960, defendant's Motion to Dismiss for want of jurisdiction in the above cause came on for hearing; and the court having heard said Motion and the court having reviewed contents of the full case on file, the court is of the opinion and finds the following:

I.

That defendant and cross-plaintiff, Adam McIntyre, did not make claim on the injury made the bases of the above action before the Industrial Accident Board of the State of Texas for the sum of TEN THOUSAND ($10,000) DOLLARS or more.

II.

That the defendant and cross-plaintiff, Adam McIntyre, has not filed a claim or suit in the above case for a sum amounting to TEN THOUSAND $(10,000.00) DOLLARS or more.

III.

That the Motion filed by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction in this Court should be and is hereby sustained.

IT IS ACCORDINGLY ORDERED, ADJUDGED, and DECREED by the court that Motion filed herein by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction of this Court is sustained and said cause of action is hereby dismissed for want of jurisdiction.

To which Order and Ruling of the Court the plaintiff, Hardware Mutual Casualty Company, duly and timely excepted in open court and gave notice of appeal to the 5th Circuit Court of Appeals.

ENTERED AND SIGNED this 15th day of August, 1960.

Original Signed by
JOE J. FISHER
United States District Judge.

D-3

No. 4327
(R. McIntyre 33)

In the District Court of the United States for the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY,

v.

ADAM MCINTYRE

MEMORANDUM DECISION

The plaintiff, Hardware Mutual Casualty Company, a Wisconsin corporation, instituted this suit on June 21st, 1960, against the defendant, Adam McIntyre, a resident and citizen of Jefferson County, Texas, seeking to set aside an award of the Industrial Accident Board of the State of Texas, made by that Board on June 20th, 1960, ordering the plaintiff to pay to defendant, workmen's compensation benefits under the Workmen's Compensation Law of the State of Texas, of $22.01 per week for fifteen consecutive weeks, beginning January 16, 1960, for injuries received which resulted in incapacity to labor. Plaintiff alleges in its original complaint, paragraph 4, that defendant filed a claim with the Industrial Accident Board of the State of Texas, alleging an injury, which was general, total and permanent; the defendant denies that the claim filed with the Industrial Acci-

dent Board of the State of Texas was based on an allegation of total and permanent disability, but that his claim was for a general injury, without any reference to the general injury being total and permanent. Based on said allegations of the defendant in his claim filed before the Industrial Accident Board of the State of Texas, and the diversity of citizenship that exists between plaintiff and defendant, defendant asserts jurisdiction of this Court in this cause under the provisions of 28, U.S.C.A., 1332, as amended.

On July 13, 1960 the defendant filed a motion to dismiss the cause for want of jurisdiction, alleging that the defendant, Adam McIntyre, did not file a claim before the Industrial Accident Board of the State of Texas for total and permanent disability, and that said allegation on the part of the plaintiff is false, and made for the purpose of conferring jurisdiction on the United States District Court. On the same defendant filed a cross-action against plaintiff, subject to his motion to dismiss, in which cross complaint he sought to recover from the plaintiff workmen's compensation benefits because of incapacity to labor he claims he suffered as the result of his injury on or about January 15, 1960, for one hundred weeks of total disability at the rate of $35.00 per week, to be followed by three hundred weeks of partial disability at the rate of $21.00 per week, or for the aggregate sum of $9,000.00.

It further appears from the pleadings that defendant and cross plaintiff, Adam McIntyre's, claim before the Industrial Accident Board of the State of Texas did not make a specific claim for total and permanent disability as a result of said

injury, but claimed only general injuries to his body without any attempt to estimate the extent and duration of said injuries. Further, plaintiff's reply to the defendant's motion to dismiss, discloses that on June 23, 1960, three days after the Industrial Accident Board Award, and two days after the plaintiff had filed its complaint in this Court, defendant and cross plaintiff filed a suit in the District Court of Jefferson County, Texas, alleging that said injuries resulted in total and permanent disability.

The plaintiff cites in support of its motion to dismiss for want of jurisdiction, the landmark case of *Booth v. Texas Employers' Ins. Ass'n.*, 123 S. W. 2d 322, and the recent case decided by the Fifth Circuit, Liberty Mutual Ins. Co. v. Horton, 275 Fed. 2d 148.

The court recognizes the authorities cited as being the law on the point, that jurisdictional amount is determined by the claim made before the Industrial Accident Board of the State of Texas, and it is the Court's opinion that this case does not present a similar fact situation, because the defendant and cross plaintiff did not claim or contend for compensation in the amount of $10,000.00 or more in his claim filed before the Industrial Accident Board of the State of Texas.

The fact that defendant and cross plaintiff filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability will not aid the plaintiff in interpreting the defendant and cross-plaintiff's claim before the Industrial Accident Board to be for total and permanent disability because said suit was admittedly filed three days

after the Industrial Accident Board's Award, and two days subsequent to the plaintiff's complaint filed in this Court.

This Court concludes that it does not have jurisdiction of this case, because the amount in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

Defendant's motion to dismiss for want of jurisdiction will be sustained.

ENTERED this the 24th day of August, A. D. 1960.

(Signed) JOE J. FISHER
United States District Judge.

D-7.

No. 4327

(R. McIntyre 35)

In the District Court of the United States for the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

AMENDED ORDER SUSTAINING MOTION TO DISMISS

BE IT REMEMBERED that on the 15th day of August, 1960, defendant's motion to dismiss for want of jurisdiction in the above cause came on for hearing, and the Court having heard said motion, and reviewing the pleadings on file in said cause, sustained said motion and entered an order dismissing said cause for want of jurisdiction. The Court has again, reviewed said file, attempting to bring it within the purview of a recent case decided by the Fifth Circuit, to-wit, Liberty Mutual Insurance Company v. Horton, 275 F. ed. 2d 148, and after comparing the facts of the respective cases, is of the opinion that the Horton case would be an authority for the Court's action in sustaining defendant's motion to dismiss for want of jurisdiction, rather than an authority for the plaintiff's position that the motion to dismiss for want of jurisdiction should be overruled.

THEREFORE, BE IT REMEMBERED that on this, the 24th day of August, A. D. 1960, the Court again considered

the motion of the defendant, Adam McIntyre, to dismiss the above entitled and numbered cause on the ground that the jurisdictional amount of this Court was not involved, and the Court being of the opinion that the jurisdictional amount in this cause is for a sum less than $10,000.00; That the defendant and cross-plaintiff, Adam McIntyre did not make a claim for compensation before the Industrial Accident Board of the State of Texas for the sum of $10,000.00 or more; That the defendant and cross-plaintiff, Adam McIntyre, has not filed a claim or suit in this Court for a sum amounting to $10,000.00 or more, but has specifically sued for compensation in the amount of $9,000.00; and the Court being of the opinion that the jurisdictional amount in this case is the sum of $9,000.00, as the amount in controversy, and further being of the opinion that the defendant's motion to dismiss for want of jurisdiction should be in all things granted and sustained;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the above numbered and entitled cause, be, and the same is hereby, dismissed for want of jurisdiction in this Court, to which action of the Court, the Plaintiff in open Court excepted and objected and gave its notice of appeal to the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

RENDERED AND ENTERED, this the 24th day of August, A. D. 1960.

(Signed) JOE J. FISHER
United States District Judge.

Filed August 24, 1960.

APPENDIX E

(R. Hart 22)

Judgment of the United States District Court for the Northern District of Texas, entered June 16, 1961 (R. Hart 22.)

[Heading Omitted]

JUDGMENT

The above entitled and numbered cause came on regularly to be heard on the 12th day of June, 1961, and came Horace M. Hart, by his attorneys, and announced in open court that the said Horace M. Hart waived his plea to the jurisdiction of the Court previously filed in the cause. And came United States Fidelity and Guaranty Company, by its attorney; and the parties; through their respective attorneys, announced ready for trial. And through their said attorneys, it was stipulated by the parties that for convenience, the nominal Defendant, Horace M. Hart, would be known in the trial as the Plaintiff, and the nominal Plaintiff, United States Fidelity and Guaranty Company, a corporation, would be known in the trail as the Defendant. And came a Jury of twelve (12) good and lawful jurors, who being duly empaneled and sworn, after having considered the pleadings as presented by respective counsel, evidence and argument of counsel, did in open court return their verdict in response to the Court's charge as follows:

> "We, the Jury, find for the Plaintiff total disability for eleven (11) weeks Partial Disability to the extent of 33⅓% for 68 weeks.
>
> William J. Moore, Foreman,"

Said findings of the Jury were received by the Court and accepted by the Court as the verdict of the Jury and were filed and entered of record on the Minutes of the Court.

It appearing to the Court from the undisputed evidence that the Defendant, United States Fidelity and Guaranty Company, has previously paid the Plaintiff, Horace M. Hart, eleven (11) weeks total disability at $35.00 per week, which is the maximum compensation rate, it is the opinion of the Court that Plaintiff is not entitled to recover anything further for total disability.

It having been agreed in open court that the average weekly wages of the Plaintiff, Horace M. Hart, before his injury was $90.00 per week, and it having been agreed in open court that any sum that might be awarded to the Plaintiff, Horace M. Hart, would be awarded to him in a lump sum, the Court is of the opinion that the Plaintiff, Horace M. Hart, is entitled to recover of and from the Defendant, United States Fidelity and Guaranty Company, sixty per cent (60%) of one-third (⅓) of $90.00 per week for a period of sixty-eight (68) weeks, or a total of $1224.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Horace M. Hart, do have and recover of and from the Defendant, United States Fidelity and Guaranty Company, the sum of $1224.00, together with all costs of suit, for which execution may issue. Out of said sum of $1224.00, $367.20 is to be received by Marvin Jones and Jack Gay of Dallas, Texas, for their services in representing said Plaintiff, Horace M. Hart.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the award of the Industrial Accident Board of the State of Texas entered on the 21st day of June, 1960, in cause No. U-11014 styled "Horace M. Hart, Employee, Wesco Materials Corporation, Employer, United States Fidelity and Guaranty Company, Insurer", be and the same is hereby set aside and held for naught.

To the foregoing judgment, the Plaintiff, Horace M. Hart, excepted and is allowed an exception.

SIGNED AND ENTERED THIS 15 day of June, 1961.

/s/ T. Whitfield Davidson
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ M. C Jones
OF ATTORNEYS FOR
PLAINTIFF

/s/ Curtis White
ATTORNEY FOR
DEFENDANT

APPENDIX F

(R. Aguirre 17)

No. 3007

In the District Court of the United States for the Western District of Texas, San Antonio Division

STANDARD ACCIDENT INSURANCE COMPANY

v.

MARCOS V. AGUIRRE, JR.

ORDER OF DISMISSAL

On the 11th day of December, 1961, at a hearing in this Court, the Defendant urged on this Court his Motion to Dismiss on the ground that the jurisdictional amount of $10,000.00 was not involved herein, and asked that this case therefore be dismissed for want of jurisdiction. The Court thereupon proceeded to inquire into the facts relative to such jurisdictional amount and finds the following to be the undisputed facts:

(1) That in the claim filed by Defendant before the Industrial Accident Board, total and permanent disability was asserted.

(2) That the proper wage rate as asserted before the Industrial Accident Board was the maximum amount of

$35.00 per wek and under the laws of Texas, 401 weeks of compensation are payable for total and permanent disability.

(3) On September 25, 1961, the Industrial Accident Board rendered its final decision awarding the defendant compensation based upon five (5) weeks at $29.33 per week, or a total of $146.65.

(4) Subsequently, the Standard Accident Insurance Company gave timely notice of appeal before the Industrial Accident Board and thereafter filed suit to set aside such final award of the Board in the United States District Court for the Western District of Texas, San Antonio Division, on September 26, 1961, at 10:35 o'clock A.M.

(5) Later on the same date, at 2:02 o'clock P.M., the Defendant, after giving timely notice of appeal, filed suit as plaintiff in the 45th District Court of Bexar County, Texas, in Cause No. F-139-313, seeking to set aside the award of the Industrial Accident Board and asking for judgment for total and permanent disability for 401 weeks of compensation of $35.00 per week or a total of $14,035.00.

(6) On December 5, 1961, Defendant filed his Motion to Dismiss, his answer and his counterclaim in this Court, alleging in his counterclaim only 250 weeks total temporary compensation at $25.00 a week or a total of $8,750.00 against Standard Accident Insurance Company.

(7) On December 11, 1961, the date of the hearing in this Court, the State Court suit for $14,035.00 was still pending and had been set on the March 1962 docket.

(8) At said hearing on December 11, 1961, counsel for Defendant orally gave his word to the Court that he had intended to and would amend the petition in the State Court to correspond to the allegations in his counterclaim in this Court, and that once said amended petition asking only for 250 weeks at the rate of $35.00 per week was filed in the State Court, Defendant would not thereafter again assert a claim for total and permanent disability.

(9) That in compliance with his word to the Court, and in order to show good faith, counsel for Defendant on December 12, 1961, filed in the 45th Judicial District Court of Bexar County, Texas, in said Cause No. F-139-313, a First Amended Original Petition on behalf of this Defendant as the Plaintiff in said cause, in which it was alleged that the Plaintiff therein, Marcos V. Aguirre, Jr., was seeking compensation for total and temporary disability for 250 weeks.

(10) That on December 15, 1961, in a stipulation filed in this cause on behalf of Defendant, it was asserted that he would not amend his paid petition filed on December 12, 1961, in the 45th Judicial District Court of Bexar County, Texas, so as to claim more compensation than 250 weeks for his total and temporary incapacity at $35.00 per week.

The Court, after considering all of the above facts, is of the opinion and finds that under such facts the jurisdictional amount of $10,000.00 is not present in this case, and, therefore, this Court does not have jurisdiction.

It is therefore ordered that this cause be and the same is hereby dismissed for want of jurisdiction.

To action of the Court in dismissing this cause for want of jurisdiction, the Standard Accident Insurance Company excepted.

Signed this the 19th day of December, A.D. 1961.

ADRIAN A. SPEARS,
(Adrian A. Spears),
United States District Judge.

Entered: Civil Order Book, Vol. No. 9, Page 664.

Filed December 19, 1961.

No. 3007

In the District Court of the United States for the Western District of Texas, San Antonio Division

STANDARD ACCIDENT INSURANCE COMPANY

v.

MARCOS V. AGUIRRE, JR.

OPINION

(R. Aguirre 20)

Plaintiff, Standard Accident Insurance Company, a Michigan corporation, filed this workmen's compensation suit to set aside a final decision of the Industrial Accident Board of Texas, which awarded the defendant, Marcus V. Aguirre, Jr., the total sum of $146.65, based upon five (5) weeks total temporary disability at the rate of $29.33 per week. Defendant had sought from the Board total permanent disability for 401 weeks at the rate of $35.00 per week.

In addition to diversity of citizenship, plaintiff alleged that the controversy involved in excess of $10,000.00, since the amount demanded before the Board totalled $14,035.00.

On the same day that this action was filed, but several hours later, the defendant instituted suit in the District Court of Bexar County, Texas, also seeking to set aside the Board's decision, and asking for judgment in the amount of

$14,035, representing total permanent disability for 401 weeks at the rate of $35.00 per week.

Subsequently, defendant filed a motion to dismiss this suit, contending that the Court has no jurisdiction, because the amount in controversy is less than $10,000. Contemporaneously therewith "if the same be necessary" he filed an answer denying that this Court has jurisdiction, and also a counterclaim in which he seeks total temporary disability at the rate of $35.00 per week for only 250 weeks, or a total sum of $8,750. This constitutes the only claim for compensation filed by defendant in this Court.

In compliance with representations made at the time of the hearing on said motion, and as evidence of his good faith, defendant amended his petition in state Court to correspond to the allegations of his counterclaim in this Court, and, through his attorney of record in both cases, filed herein a stipulation and promise that he would not thereafter again assert a claim in state Court for more than 250 weeks at the rate of $35.00 per week.

Recognizing the congested condition of the dockets in federal Courts, Congress, in 1958, increased the jurisdictional amount in diversity of citizenship cases to $10,000,[1] and provided that a "civil action in any State Court arising under the workmen's compensation laws of such State may not be removed to any district Court of the United States."[2]

Ordinarily, the one who claims that something is due or belongs to him initiates a lawsuit as the plaintiff therein.

[1] 28 U.S.C., Section 1332.

[2] 28 U.S.C., Section 1445(c).

His complaint, filed in apparent good faith, generally determines the amount in controversy, unless the law gives a different rule. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 388; 82 L. Ed. 845; 58 S. Ct. 586. However, the Texas Workmen's Compensation Law permits either the employee or the insurance company to bring suit to set aside the final ruling of the Industrial Accident Board, but when the insurance company wins the race to the Courthouse, and the employee for the first time asserts his claim in federal Court in a counterclaim, he still has the burden of proving his right to recover.

The determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, and the amount originally claimed before the Industrial Accident Board does not control. Horton v. Liberty Mutual Insurance Co., 367 U. S. 348, 352; 6 L. Ed. (2) 890; 81 S. Ct. 1570. In the Horton case, supra, the contention was made that the Board's award of $1,050 determined the amount in controversy. The Supreme Court in upholding the jurisdiction of the district Court in that case, pointed out, among other things, that the petitioner's claim before the Board was $14,035; that his state Court suit asked that much; that he had not denied the jurisdictional allegations of respondent's complaint; that his conditional counterclaim in federal Court claimed the same amount; and that he made no attempt to surrender or disclaim any part of his original claim.

Art. 8307, Section 5, Vernon's Annotated Texas Statutes.

Here, although the original claim before the Industrial Accident Board and in State Court was in excess of $10,000, the Board's award was only $146.65. The defendant in his answer denied that this Court has jurisdiction, and he has, in good faith, the only time his claim was asserted in federal Court, surrendered $5,285 of his original demand. It is clear that this claim in both state and federal Courts is limited to 250 weeks total temporary disability at the rate of $35.00 per week, or $8,750. Since, therefore, he does not really have a claim in excess of $10,000, it is my opinion that the motion to dismiss for want of jurisdiction should be granted, and judgment is being entered accordingly.

ADRIAN A. SPEARS,
(Adrian A. Spears),
United States District Judge.

Filed December 19, 1961.

APPENDIX G

Workmen's Compensation Law, Texas Civil Statutes Vernon's Art. 8307, Sec. 5

Art. 8307 (in relevant part)

Determination of Questions: Suit to Set Aside Final Ruling and Decision

Sec. 5. All questions arising under this law, if not settled by agreement of the parties interested therein and within the provisions of the law, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision by said board, file with said board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the county where the injury occurred to set aside said final ruling and decision, and said board shall proceed no further toward the adjustment of such claim, other than hereinafter provided. In all cases of occupational diseases for the purpose of determining venue when an appeal is effected to set aside the final ruling and decision of the Board, suit shall be brought in a court of competent jurisdiction in the said county in which the employee was last exposed to the disease alleged, prior to the manifestation of the disease, or death therefrom, or in the county in which the adverse party resides, or has a permanent place or business, or by agreement of the parties in a court of competent jurisdiction in any county in this state. Whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provision of this law, and the suit of the injured employee or person suing on account of the death of such em-

ployee shall be against the association, if the employer of such injured or deceased employee at the time of such injury or death was a subscribed as defined in this law. If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation. The Industrial Accident Board shall furnish any interested party in said claim pending in court upon request free of charge, with a certified copy of the notice of the employer becoming a subscriber, filed with the Board, and the same when properly certified to shall be admissibel in evidence in any court in this State upon trial of such claim therein pending and shall be prima facie proof of all facts stated in such notice in the trial of said cause unless same is denied under oath by the opposing party therein. In case of recovery, the same shall not exceed the maximum compensation allowed under the provisions of this law. If any party to such final ruling and decision of the board, after having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto; and, if the same is against the association, it shall at once comply with such final ruling and decision; and failing to do so the board shall certify the fact to the Commissioner of Insurance and such certificate shall be sufficient cause to justify said Commissioner to revoke or forfeit the license or permit of such association to business in Texas.

APPENDIX H

Workmen's Compensation Law, Texas Civil Statutes Vernon's Art. 8306, Sec. 10

Art. 8306 (in relevant part)

Total Incapacity

Sec. 10. While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to sixty per cent (60%) of his average weekly wages, but not more than Thirty-five Dollars ($35) nor less than Nine Dollars ($9) and in no case shall the period covered by such compensation be greater than four hundred and one (401) weeks from the date of the injury.

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No. 317

IN THE

Supreme Court of the United States

No. 18557 (In U. S. Court of Appeals, Fifth Circuit)

HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner
v.
ADAM McINTYRE, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari

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No. 317

IN THE

Supreme Court of the United States

HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner

v.

ADAM McINTYRE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion and judgment in the Fifth Circuit is not yet in the reports. It is attached as Appendix A, *infra*.

Jurisdiction

The judgment of the Appeals Court was entered on June 20, 1962 (Appendix A). No motion for rehearing was filed. The petition for a writ of certiorari was filed on the

10th day of August, 1962. The jurisdiction of this court is invoked under 28 U. S. C. A. § 1254 (1).

Questions Presented

1. Is the decision of the majority in conflict with the rule for determining jurisdiction as to the amount in controversy as laid down in *Horton v. Liberty Mutual Insurance Company*, 6 L. Ed. 2d. 890, 367 U. S. 348, by this Court as claimed by the dissenters, Judge Rives and Judge Hutcheson?

2. In diversity actions, is the amount in controversy in a Federal District Court determined by the good faith allegations of the complaint, or by the amount of the claimant's counterclaim?

Statutes Invoked

28 U. S. C. A. § 1332 in part:

> "§ 1332. Diversity of Citizenship; amount in controversy; costs.
>
> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and is between—
>
> "(1) Citizens of different states;"

Texas Civil Statutes, Vernon's Art. 8307, sec. 5 (part relevant), Appendix B, *infra*; Art. 8306, sec. 10 (part relevant), Appendix C, *infra*.

Statement

This Workmen's Compensation Suit was instituted by the Petitioner, Hardware Mutual Casualty Company, against the Respondent, Adam McIntyre, seeking to set

aside an award of the Industrial Accident Board of the State of Texas made in the claim filed by Respondent, Adam McIntyre. Petitioner alleged that there was jurisdiction in the trial court below because of diversity of citizenship in that Petitioner was a Wisconsin Corporation, and that Respondent was a citizen of Jefferson County, Texas; and Petitioner alleged further that the amount in controversy was in excess of the sum or value of $10,000.00, exclusive of interest and costs. (McIntyre R. 2-6). The award of the Industrial Accident Board in this case was made on the 20th day of June, 1960. (McIntyre R. 2). Petitioner, as plaintiff, filed its complaint in the trial court below on June 21, 1960. (McIntyre R. 2). Respondent, in DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION, by verified pleadings, denied that the amount in controversy before the Industrial Accident Board of the State of Texas in the claim by Respondent amounted to or exceeded $10,000.00. (McIntyre R. 6-10). On June 23, 1960, two days after Petitioner filed its complaint in the trial court below, Respondent filed suit against Petitioner as Defendant in the District Court of Jefferson County, Texas, alleging, among other things, that Petitioner was obligated to pay Respondent the sum of $27.00 per week for a period of 401 weeks, plus interest on all past due installments which Respondent was entitled to under the law; and Respondent in such suit sued for the additional sum of $2,000.00 for medical expenses. (McIntyre R. 13-14).

On July 13, 1960, the same day Respondent, as defendant, filed DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION, Respondent filed Defendant's Original Answer and Cross-Action, *subject* to his Motion to Dismiss for Want of Jurisdiction, seeking to

recover the sum of $27.00 per week for a period of 100 weeks, plus $21.00 per week for 300 weeks, or a total of $9,000.00. (McIntyre R. 17-22).

Petitioner filed "PLAINTIFF'S REPLY TO DEFENDANT'S COUNTERCLAIM" on July 15, 1960. (McIntyre R. 23-25).

On the 15th day of August, 1960, "DEFENDANT'S (RESPONDENT'S) MOTION TO DISMISS FOR WANT OF JURISDICTION" was heard by the trial court below and from the evidence presented at such hearing and from a full review of the contents of the full case on file the trial court found the following:

I.

"That the defendant and cross-plaintiff, Adam McIntyre, did not make claim on the injury made the basis of the above action before the Industrial Accident Board of the State of Texas for the sum of TEN THOUSAND ($10,000.00) DOLLARS *or more*. (emphasis added).

II.

That the defendant and cross-plaintiff, Adam McIntyre, *has not* filed *a claim or suit in the above case for a sum* amounting to TEN THOUSAND ($10,000.00) DOLLARS *or more*. (emphasis added).

Based on the above finding by the trial court the Defendant's (Respondent's) Motion to Dismiss for Want of Jurisdiction was sustained by the trial court and said cause of action filed by Petitioner was dismissed for want of jurisdiction. (McIntyre R. 25-26). The court renewed this order (and the findings of fact) on August 24, 1960. (McIntyre R. 35-37).

Argument

In a suit founded upon diversity of citizenship which is filed in Federal Court under the Texas Workmen's Compensation Law, the amount in controversy is the amount which the claim filed with the Industrial Accident Board show in dollars and cents or by statement of facts from which the amount can *definitely* be determined, and the suit should be filed in the court having jurisdiction of that amount.

The substantive law of the State of Texas is controlling in deciding the amount of the claim made before the Industrial Accident Board of the State of Texas in the claim filed by Respondent, Adam McIntyre. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.C.T. 817 (1937).

The substantive law of the State of Texas is:

> "When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can *definitely* be determined and the award of the board is less in amount than that of the claim, the amount shown by the claim is the amount in controversy and the suit should be filed in the Court having jurisdiction of that amount." *Booth v. Texas Employer's Assn.*, 123 S.W. 2d 322, 331 (Tex. Comp. App. Opinion adopted by the Supreme Court, 1938).

When Petitioner, as Plaintiff, filed its complaint in the trial court below to set aside the award of the Industrial Accident Board in the claim filed by Respondent, Adam McIntyre, the Board's findings and award were totally abrogated. *Booth v. Texas Employers Insurance Association*,

supra.; *Liberty Mutual Insurance Company v. Horton* (5 Cir. 1960), 275 F. 2d 148.

The record in this case on appeal before this Honorable Court does not show that Respondent made claim before the Industrial Accident Board of the State of Texas for $10,000.00 or more and there is nothing before this court other than the mere allegations of appellant contained in the transcript upon which this court could make a finding of fact contrary to those findings of fact made by the trial court; and under such state of the record this court can not set aside, ignore or alter the findings of fact made by the trial court.

The only thing this court on appeal can consider in determining the amount in controversy in the suit filed by Petitioner in the trial court below is whether the amount of Respondent's claim before the Industrial Accident Board of the State of Texas amounted to $10,000.00 or more. There is nothing before this court on this appeal from which this Honorable Court can determine the amount of Appellee's claim before the Industrial Accident Board of the State of Texas or the findings of the trial court in its ORDERS SUSTAINING MOTION TO DISMISS AND DISMISSING CAUSE FOR WANT OF JURISDICTION, other than the mere allegations contained in Petitioner's (as Plaintiff) Complaint filed in the trial court below to set aside the award of the Industrial Accident Board of the State of Texas made in the claim filed by the Respondent, Adam McIntyre. (McIntyre R. 2-26). There is nothing in the record from which this Court could find that the trial court was in error in finding that the Respondent, Adam McIntyre, did not make claim on the injury made the basis of the action in the trial court before

the Industrial Accident Board of the State of Texas for the sum of $10,000.00 or more; and there is nothing in the record from which this Court could find that the trial court made an error in finding that Respondent, Adam McIntyre, did not file a claim or suit in the trial court below for a sum amounting to $10,000.00 or more. (McIntyre R. 2-26).

The findings of the Industrial Accident Board of the State of Texas in the claim filed by Respondent, Adam McIntyre are not in the transcript of record in this case on appeal and the evidence (or statement of facts) filed by Respondent, Adam McIntyre, before the Industrial Accident Board of the State of Texas is not before this court; nor is there any statement of facts before this court. The allegations contained in Petitioner's (as Plaintiff) Original Complaint filed in the trial court below concerning the amount in controversy amount to nothing because they were denied there by verified pleadings on the part of Respondent; and, also, Petitioner's pleadings show that Petitioner was not in good faith in alleging that the amount in controversy came within the jurisdiction of the trial court because Petitioner alleged that Respondent was on the 15th day of April, 1960, capable and able to do the same type of work as before his injuries and that Respondent so advised the Industrial Accident Board of the State of Texas as to such fact; and Petitioner further alleged that Respondent was not entitled to recover for compensation and denied that Respondent had any residual disability or any loss of earning power or any loss of wage earning capacity. (McIntyre R. 4-5). The fact that Petitioner filed an Answer to the Motion of Respondent To Dismiss For Want Of Jurisdiction; and

the fact that the Clerk certified that there was no denial filed by Respondent denying the facts alleged in Petitioner's Answer To the Motion of Respondent asserting lack of jurisdiction amounts to nothing because the facts concerning the question of the amount in controversy were put in issue when Respondent filed his Motion To Dismiss For Want Of Jurisdiction. There was no necessity for Respondent, under the law, to again file a pleading denying the matters that were already denied and put in issue by the filing of Respondent's Motion To Dismiss For Want Of Jurisdiction.

The burden is on Petitioner, since Petitioner has attacked the fact findings made by the trial court concerning the amount in controversy, to show that said fact findings by the trial court are clearly wrong; and said fact findings made by the trial court, concerning the amount in controversy before the Industrial Accident Board of the State of Texas, can not be set aside by this Court unless Petitioner can show this Court that said fact findings are clearly erroneous. *Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium*, 145 F. 2d 661, certiorari denied 65 S. Ct. 1024, 324 U.S. 877, 89 L. Ed. 1429; *Federal Rules of Civil Procedure*, rule 52(a), 28 *U.S.C.A.*; *Grace Bros. v. C. I. R.*, 173 F. 2d 170. The fact findings made by the trial court below concerning the amount in controversy are presumptively correct, and in the absence of a proper record, which contains all of the evidence essential to enable this Honorable Court to determine the correctness or incorrectness of said challenged fact findings can not be questioned on review. *Public Service Commission of Puerto Rico v. Havemeyer*, 56 S. Ct. 360, 296 U.S. 506, 80 L. Ed. 392, rehearing denied

56 S. Ct. 496, 297 U.S. 727, 80 L. Ed. 1010; *Sublette v. Servel, Inc.*, 124 F. 2d 516.

The trial court's order sustaining Respondent's Motion to Dismiss For Want of Jurisdiction specifically states as *facts* the following:

> "BE IT REMEMBERED that on the 15th day of August, 1960, defendant's Motion to Dismiss for want of jurisdiction in the above cause *came on for hearing; and the court having heard said Motion* and the court having reviewed contents of the full case on file, the court is of the opinion and *finds* the following:" (Emphasis added) (Tr. 25).

The statement of facts by the trial court that said motion came on for hearing and that the Court heard said motion are statements of fact by the trial court and findings of fact by the trial court that a hearing was held; and it should not be presumed by this court on appeal that said statement and findings of fact by the trial court did not occur. *Dr. William Howard Hay Foundation v. Safety Harbor Sanatorium*, 145 F. 2d 661, certiorari denied 65 S. Ct. 1024, 324 U.S. 977, 89 L. Ed. 1429; *Federal Rules of Civil Procedure*, rule 52(a), 28 *U.S.C.A.*; *Grace Bros. v. C. I. R.*, 173 F. 2d 170; *Sublette v. Servel, Inc.*, 124 F. 2d 516.

The trial court did not make any error in reaching the conclusion that "The Fact that Defendant and Cross-Plaintiff filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability", would not aid the plaintiff in interpreting the defendant and cross-plaintiff's claim before the Industrial Accident Board to be for total and permanent disability.

There is absolutely nothing in the record, or otherwise, before this court which can properly be considered by this court to show that the trial court made an error in concluding that the fact that Respondent filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability would not aid the Petitioner in interpreting the Respondent's claim before the Industrial Accident Board to be for total and permanent disability. The fact that such cause of action was filed by Respondent in the State Court after Petitioner filed its complaint in the trial court below to set aside the award of the Industrial Accident Board in the claim filed by Respondent could not have been properly considered by the trial court because the question of the amount in controversy is decided by what claim Respondent filed with the Industrial Accident Board. *Booth v. Texas Employers Insurance Association, supra; Liberty Mutual Insurance Co. v. Horton, supra.*

The fact that Respondent filed suit in the District Court of Jefferson County, Texas, two (2) days after the filing of this Civil Action, to recover $12,827.00 for the same industrial injury made the subject of the suit in the trial court below is not an admission by respondent that the amount in controversy is $10,000.00 or in excess of $10,000.00, plus interests and costs.

The Petitioner filed its Complaint in the trial court below two (2) days *before* Respondent filed suit in the State Court. The filing of the suit by Respondent in the State Court could not be considered by the trial court below, nor can such fact be considered by this court, in determining the amount in controversy because the jurisdictional amount is to be judged as of the time the original

Complaint is filed in the trial court. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845; *Carr v. Fife*, 156 U.S. 494, 15 S. Ct. 427, 39 L. Ed. 508; *Anderson v. Watts*, 138 U.S. 694, 11 S. Ct. 449, 34 L. Ed. 1078; *National Surety Corporation v. Chamberlain*, 171 F. Supp. 591; *Cumberland v. Household Research Corp. of America, D. C. Mass.*, 145 F. Supp. 782.

Petitioner failed to meet its burden of proof of establishing that the District Court below had jurisdiction.

The burden of establishing federal jurisdiction is on him (Petitioner) who alleges it. *Buck v. Gallagher*, 307 U.S. 95, 59 S. Ct. 740, 83 L. Ed. 1128; *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725, 83 L. Ed. 1111; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135.

The only thing Petitioner did to meet its burden was to file inconsistent pleadings in the trial court concerning the amount in controversy. See paragraphs I, IV and V of Plaintiff's (Petitioner's) Original Complaint and compare paragraphs VI, VII, VIII and the Prayer of said complaint.

The allegations in paragraph I, IV and V of Plaintiff's (Petitioner's) Original Complaint are mere allegations which were denied by verified pleadings filed by Respondent (McIntyre, R. 6-10). Such allegations and the *facts* arising therefrom were put in issue and the finding of *fact* by the trial court below are in favor of Respondent. (McIntyre, R. 25-26). Such findings of fact by the trial court must stand. Authorities cited *supra*.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF
CARL WALDMAN
320 College Street
Beaumont, Texas

RAYMOND T. R. TATUM
318 Goodhue Building
Beaumont, Texas

JOE H. TONAHILL
Tonahill Building
Jasper, Texas

By Joe H. Tonahill
Joe H. Tonahill, of Counsel

Affidavit of Service

I, Joe H. Tonahill, of Counsel for Respondent, do hereby certify that service of a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been made on Petitioner by mail in accordance with the Rules of this Court.

Dated this 7th day of September, 1962.

Joe H. Tonahill
Joe H. Tonahill
Of Counsel for Respondent

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 18557

(R. McIntyre 44)

HARDWARE MUTUAL CASUALTY COMPANY,
Appellant

versus

ADAM McINTYRE, *Appellee*

Appeal from the United States District Court for the Eastern District of Texas

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(June 20, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and JONES, Circuit Judges.

TUTTLE, Chief Judge: The single question presented by this appeal is whether the District Court properly dismissed appellant's suit for want of jurisdiction on the ground that the matter in controversy, exclusive of interest and costs, did not exceed the sum of $10,000.00 as required by 28 U.S.C. §1332. For the reasons hereafter stated, we affirm the judgment of the District Court.

On January 15, 1960, the appellee, Adam McIntyre, a resident of Texas, was injured while working for his employer in Nome, Texas. The employer's compensation carrier under the Texas Workmen's Compensation Law was the appellant, Hardware Mutual Casualty Company, a Wisconsin corporation. On February 25, 1960, the appellee filed a claim with the Texas Industrial Accident Board in which he simply described the circumstances surrounding his injury did not request a specific amount of compensation.[1]

On June 20, 1960, the Board awarded the appellee compensation in the amount of $22.01 per week for 15 consecutive weeks commencing January 16, 1960, or a total of $330.15.

The very next day, the appellant filed this suit to "set aside" the award. The complaint alleged generally that the matter in controversy exceeded $10,000, and specifically, that:

> "The claim filed by the defendant for compensation with the Industrial Accident Board of Texas is for total and permanent incapacity . . . and although the claim for compensation is not set out with particularity [with respect to] the amount of money [claimed] . . . [the] amount fixed by law for compensation [for total and permanent incapacity] is a sum which is within the jurisdiction of this Court; . . ."

---

[1]Appellee's claim stated simply that "while he was jacking up a tractor, the jack leg fell, causing the tractor to fall on his left shoulder and right leg." On March 15, 1960, the appellee amended his claim to state the following: "I was taking a wheel off a tractor and it fell on me, breaking my left clavicle and injuring my left shoulder, back and side and causing general injuries to my body."

The source of appellant's dissatisfaction with the award is revealed in the following allegation of the complaint:

> "The plaintiff paid defendant compensation until on or about the 15th day of April, 1960, and suspended and stopped the payment of same because the claimant was then capable and able to do the same type of work as before his alleged injuries and plaintiff so advised the Industrial Accident Board of the State of Texas to such effect and plaintiff is now claiming and does claim that defendant is not entitled to recover for compensation from plaintiff or in the amount as shown and set forth in the above mentioned award of the Industrial Accident Board of Texas. The defendant has been paid for his temporary total incapacity and plaintiff denies that defendant has any residual disability or any loss of earning power or any loss of wage earning capacity."[2]

The complaint prayed for judgment "setting aside" the award and that the appellee "be denied any and all relief by way of compensation."

On July 13, 1960, the appellee moved to dismiss the complaint for want of jurisdiction, alleging that he did not claim "total and permanent incapacity" before the Board, that he did not claim compensation in excess of $10,000 before the Board, and that the amount in controversy thus did not exceed $10,000. On the same day, the appellee filed his answer to the complaint, which contained essentially the same allegations as were contained in his motion to dismiss. The answer further alleged that the appellee "sustained some total disability but that said total disability was not permanent." Also on July 13, 1960, the

[2] In other words, the appellant claims that the award gave the appellee $44.02 too much.

appellee filed a counterclaim against the appellant wherein he claimed total disability for 100 weeks and partial disability for another 300 weeks. The counterclaim prayed for judgment in the sum of $27 per week for 100 weeks and $21 per week for 300 weeks, or a total of $9,000.

Prior to July 13, 1960, and on June 23, 1960, the appellee had filed a civil action against the appellant in a Texas state court wherein he alleged total disability for 401 weeks. The complaint in the state court prayed for judgment in the sum of $27 per week for 401 weeks plus $2,000 medical expenses, or a total of $12,827.

On August 15, 1960, the District Court granted appellee's motion to dismiss on the grounds (1) that the appellee had not claimed compensation in excess of $10,000 before the Texas Industrial Accident Board and (2) that the appellee had not sought to recover a sum in excess of $10,000 in the instant suit.

Any analysis of the problem here involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348. That case, as this one, concerned a suit by an insurer to "set aside" an award of the Texas Industrial Accident Board. The award in that case was $1,050. The injured workman had claimed $14,035 before the Board, had instituted a suit in a state court for $14,035, and had counterclaimed in the federal action for $14,035. The Court upheld the jurisdiction of the district court in the following language:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, although the federal

courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board . . .

"The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." In deciding this question of good faith we have said that it "must appear . . . a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035, which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. *No denial of these allegations in the complaint has been made; no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy.* It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035

> claim open for adjudication in a *de novo* court trial, regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remain the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000." (Emphasis added)

One thing appears clearly from the foregoing language; and that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to "set aside" the award. This is because the mere filing of suit by the insurer absolutely nullifies the award, so that its amount can never be said to be "in controversy" in the action. Indeed, the mere mention of the nature or amount of the award during the trial has been held to be prejudicial error by the Texas Courts. *Fidelity Union Casualty Co. v. Klatt*, 47 S.W. 2d 417.

We interpret Horton to prescribe the following test for determining whether federal jurisdiction exists when an insurer brings suit to "set aside" an award of the Texas Industrial Accident Board: If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to "set aside" the award, federal jurisdiction exists *unless* the insured denies the allegation that he will seek more than $10,000 in the court action and makes an affirmative claim for compensation for a sum which does not exceed $10,000.

We realized of course, that such a rule gives the insured the power to defeat federal jurisdiction simply by asserting a claim for less than $10,000 after he is brought into court by the insurer. But, however much this may depart from traditional notions of pleading federal jurisdiction, the procedure for "setting aside" an award established by the Texas Compensation Law leaves no satisfactory alternative. The Texas Compensation Law permits any interested party, including, of course, the insurer, to bring suit to "set aside" the award of the Industrial Accident Board. As noted previously, however, once such an action is commenced, the award becomes an absolute nullity under the Texas statute. The filing of the suit, in and of itself, abrogated the award, and this is so even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. See *Zurich General Accident Co. v. Rodgers*, 97 S.W. 2d 674; *Texas Reciprocal Ins. Ass'n. v. Leger*, 97 S.W. 2d 677. The insurer is under no obligation to prove that the award was erroneous, even though the insurer's action is designated as an action to "set aside" the award. To the contrary, once an action such as this is filed, a trial *de novo* is conducted, and the burden is on the *insured* (here, the defendant) to plead and prove whether and to what extent he is entitled to compensation. Thus, when the insurer institutes such an action, it is a "plaintiff" in name only. The filing of suit by the insurer is nothing more than a notice to the insured to come into court and prove his claim.

Thus it is that the amount actually in controversy in the action cannot be determined until the insured responds to this notice by filing a claim for compensation against the insurer. The insured's "counterclaim" is, for all intents and purposes, the *only* claim involved in the action.

If the insured asserts a claim for compensation for a sum which does not exceed $10,000, it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances can the insured recover more than $10,000 in the suit. This being so, there is no federal jurisdiction.

The appellant argues that the amount in controversy can best be determined by looking to the amount claimed by the insured before the Industrial Board. For one thing, it does not appear that the test suggested by the appellant was adopted by the Supreme Court in Horton. For another, assuming the question was an open one, we think the rule proposed by the appellant has little to recommend it.

In Horton, the Supreme Court specifically noted that we are not bound by the Texas rule which, in certain cases, provides that the amount in controversy is fixed by the amount claimed by the insured before the Industrial Accident Board. After so noting, the Court did not say that we should adopt this rule as a matter of Federal law. Rather, the Court went to some lengths to point out that the insurer in that case had alleged that the insured had claimed and *would claim* in excess of $10,000, and that the insured had made "no denial of these allegations." If the Court had meant to adopt the test urged by the appellant here, it could have done so in plain and simple language. In that event, we think, the opinion would not have emphasized, as it did, that the *insured* was vigorously asserting a claim for compensation for a sum exceeding the jurisdictional amount. In short, we do not think that the majority opinion in Horton is fairly susceptible to the interpretation which the appellant places upon it.

Moreover, it seems to us that the rule proposed by the appellant has at least two serious shortcomings. First of all, the Texas Compensation Law does not require an insured to claim a specific sum of money before the Industrial Accident Board; nor does it even require him to state sufficient facts from which the amount claimed can definitely be determined. *Booth v. Texas Employers' Ins. Ass'n*, 123 S.W. 2d 322. Thus, if the rule suggested by the appellant was adopted, it would be impossible to fix the amount in controversy in a case where the insured did not claim a specific sum before the Board and did not state sufficient facts from which the amount claimed could be determined. Since the latter situation is apparently of common occurrence, appellant's suggested test would have rather limited utility.

Secondly, the Texas law is clear that the insured is not ordinarily bound by the amount which he claims before the Board. Where, as here, the claim is for general injuries suffered, the insured, in a court action to "set aside" the award, can increase the amount of his claim to include compensation for all injuries proximately resulting from the accident. *Booth v. Texas Employers' Ins. Assn., supra.* Similarly the insured can reduce the amount of his claim if he sees fit to do so. Thus, the amount of the claim before the Board is hardly a reliable indicator of the amount actually in controversy in the federal court action.

The appellant contends that it would be unfair to permit the insured to defeat federal jurisdiction by claiming less than the jurisdictional amount in the action, since the insured would then be free to assert a claim for more than $10,000 in a state court action and the insurer would be unable to remove to a federal court because of the Congressional ban on the removal of state workman's com-

pensation cases. See 28 U.S.C. §1322. Of course, the simple answer to this is that, regardless of any possible unfairness a federal court does not have jurisdiction in a diversity case unless the amount is controversy exceeds the sum of $10,000. Appellant's argument would be equally applicable, and equally unavailing, in numerous other cases where the amount in controversy does not reach the federal standard. For example, suppose a plaintiff brought suit against a defendant for $5,000 and alleged that the defendant had a compulsory counterclaim against the plaintiff for $15,000. Certainly, the defendant would be entitled to have the case dismissed for want of jurisdiction, even though the defendant could then bring suit for $15,000 in a state court and the case could not be removed because the suit was commenced in the original plaintiff's home district. However real the possibility of losing an opportunity to have the case tried in a federal court, it cannot vitiate the fact that the amount in controversy in an action such as the instant one is the amount claimed by the insured in the action and that, where the amount there claimed does not exceed $10,000, the federal standard has not been met. We might note, on the other hand, that if an insured subsequenly sues in a state court for more than $10,000, he would probably have some difficulty overcoming the effect of his previous judicial admission that he was not entitled to more than $10,000. This may well afford all the protection the insurer needs.

In the present case, it appears that the appellee did not claim more than $10,000 before the Industrial Accident Board and that he counterclaimed for $9000 in the action commenced by appellant. The District Court, in a decision rendered before the Supreme Court's decision in Horton,

dismissed the appellant's action on both the above grounds. For the reasons heretofore stated, we think dismissal was justified on the sole ground that the appellee's claim in the action was for less than $10,001. The judgment is, therefore,

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

I would simply "reverse on the authority of the Horton cases." As I read these cases, which are controlling here, it is quite plain that Judge Fisher's holding in this case, that federal jurisdiction did not exist, is not supported by the holding in those cases, that the claim of the insurance carrier determines federal jurisdiction unless the amount in controversy stated by it is found to a legal certainty to be not stated in good faith. Judge Fisher's finding in this case that, though the plaintiff sued in the state court for $12,827, he could, by limiting his counterclaim in federal court to $9.000, defeat the jurisdiction as asserted in the insurer's suit, in my opinion, goes directly counter to the holding of the Horton cases, and his judgment must be reversed, for affirmed.

I respectfully DISSENT from the opinion of the majority.

A true copy
Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana
By CLAIR R. JAMES
Dy. Clerk

(Seal)

Aug 2 1962

JUDGMENT.

Extract from the Minutes of June 20, 1962

No. 18557

(R. McIntyre 56)

HARDWARE MUTUAL CASUALTY COMPANY

versus

ADAM McINTYRE

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Hardware Mutual Casualty Company be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, Dissents."

* * *

APPENDIX B

No. 4327

(R. McIntyre 25)

In The
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

ORDER SUSTAINING MOTION TO DISMISS AND DISMISSING CAUSE FOR WANT OF JURISDICTION

BE IT REMEMBERED that on the 15th day of August, 1960, defendant's Motion to Dismiss for want of Jurisdiction in the above cause came on for hearing; and the court having heard said Motion and the court having reviewed contents of the full case on file, the court is of the opinion and finds the following:

I.

That defendant and cross-plaintiff, Adam McIntyre, did not make claim on the injury made the basis of the above action before the Industrial Accident Board of the

State of Texas for the sum of TEN THOUSAND $(10,000) DOLLARS or more.

II.

That the defendant and cross-plaintiff, Adam McIntyre, has not filed a claim or suit in the above case for a sum amounting to TEN THOUSAND ($10,000) DOLLARS or more.

III.

That the Motion filed by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction in this Court should be and is hereby sustained.

IT IS ACCORDINGLY ORDERED, ADJUDGED, and DECREED by the court that Motion filed herein by defendant and cross-plaintiff, Adam McIntyre, for dismissal of the above cause for want of jurisdiction of this Court is sustained and said cause of action is hereby dismissed for want of jurisdiction.

To which Order and Ruling of the Court the plaintiff, Hardware Mutual Casualty Company, duly and timely excepted in open court and gave notice of appeal to the 5th Circuit Court of Appeals.

ENTERED AND SIGNED this 15th day of August, 1960.

Original Signed by

JOE J. FISHER
United States District Judge

APPENDIX C

No. 4327

(R. McIntyre 33)

In The

DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Texas, Beaumont Division

HARDWARE MUTUAL CASUALTY COMPANY

v.

ADAM McINTYRE

MEMORANDUM DECISION

The plaintiff, Hardware Mutual Casualty Company, a Wisconsin corporation, instituted this suit on June 21st, 1960, against the defendant, Adam McIntyre, a resident and citizen of Jefferson County, Texas, seeking to set aside an award of the Industrial Accident Board of the State of Texas, made by the Board on June 20th, 1960, ordering the plaintiff to pay to defendant, workmen's compensation benefits under the Workmen's Compensation Law of the State of Texas, of $22.01 per week for fifteen weeks beginning January 16, 1960, for injuries received which resulted in incapacity to labor. Plaintiff alleges in its original complaint, paragraph 4, that defendant filed a claim with the Industrial Accident Board of the State of Texas, alleging an injury, which was general, total

and permanent; the defendant denies that the claim filed with the Industrial Accident Board of the State of Texas was based on an allegation of total and permanent disability, but that his claim was for a general injury, without any reference to the general injury being total and permanent. Based on said allegations of the defendant in his claim filed before the Industrial Accident Board of the State of Texas, and the diversity of citizenship that exists between plaintiff and defendant, defendant asserts jurisdiction of this Court in this cause under the provisions of 28, U.S.C.A., 1332, as amended.

On July 13, 1960 the defendant filed a motion to dismiss the cause for want of jurisdiction, alleging that the defendant, Adam McIntyre, did not file a claim before the Industrial Accident Board of the State of Texas for total and permanent disability, and that said allegation on the part of the plaintiff is false, and made for the purpose of conferring jurisdiction on the United States District Court. On the same day defendant filed a cross-action against plaintiff, subject to his motion to dismiss, in which cross complaint he sought to recover from the plaintiff workmen's compensation benefits because of incapacity to labor he claims he suffered as the result of his injury on or about January 15, 1960, for one hundred weeks of total disability at the rate of $35.00 per week, to be followed by three hundred weeks of partial disability at the rate of $21.00 per week, or for the aggregate sum of $9,000.00.

It further appears from the pleadings that defendant and cross-plaintiff, Adam McIntyre's, claim before the Industrial Accident Board of the State of Texas did not make a specific claim for total and permanent disability as a result of said injury, but claimed only general injuries

to his body without any attempt to estimate the extent and duration of said injuries. Further, plaintiff's reply to the defendant's motion to dismiss, discloses that on June 23, 1960, three days after the Industrial Accident Board Award, and two days after the plaintiff had filed its complaint in this Court, the defendant and cross plaintiff filed a suit in the District Court of Jefferson County, Texas, alleging that said injuries resulted in total and permanent disability.

The plaintiff cites in support of its motion to dismiss for want of jurisdiction, the landmark case of *Booth v. Texas Employers' Ins. Ass'n.*, 123 S.W. 2d 322, and the recent case decided by the Fifth Circuit, *Liberty Mutual Ins. Co. v. Horton*, 275 Fed. 2d 148:

The court recognizes the authorities cited as being the law on the point, that jurisdictional amount is determined by the claim made before the Industrial Accident Board of the State of Texas, and it is the Court's opinion that this case does not present a similar fact situation, because the defendant and cross plaintiff did not claim or contend for compensation in the amount of $10,000.00 or more in his claim filed before the Industrial Accident Board of the State of Texas.

The fact that defendant and cross plaintiff filed a cause of action in the State Court of Jefferson County, Texas, for total and permanent disability will not aid the plaintiff in interpreting the defendant and cross-plaintiff's claim before the Industrial Accident Board to be for total and permanent disability because said suit was admittedly filed three days after the Industrial Accident Board's Award, and two days subsequent to the plaintiff's complaint filed in this Court.

This Court concludes that it does not have jurisdiction of this case, because the amount in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

Defendant's motion to dismiss for want of jurisdiction will be sustained.

ENTERED this the 24th day of August, A. D. 1960.

(Signed) JOE J. FISHER
United States District Judge

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No. 318 and 319

In the

Supreme Court of the United States

OCTOBER TERM 1962

UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioner,

v.

HORACE HART,
Respondent.

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

MARCOS V. AGUIRRE, JR.,
Respondent.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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Respondent.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

The instant cases involve the determination of federal jurisdictional amount in diversity suits by workman's compensation insurers to set aside awards of the Texas Industrial Accident Board. This question was recently before this Court in *Horton v. Liberty Mutual Insurance Company, 367 U. S.*

318. In *Horton* the compensation insurer brought suit to set aside a Board award of $1,050 and *correctly* alleged that the defendant employee would claim more than $10,000. The employee in *Horton* moved to dismiss for want of federal jurisdiction, and subject thereto, admitted he would claim more than $10,000 in federal court, and filed a counterclaim in federal court for $14,035. In the cases at bar the insurance carriers brought separate suits to set aside Board awards of $330.50 (McIntyre), $910 (Hart), and $146.65 (Aguirre), respectively. The Respondent employees in each instance denied the existence of federal jurisdictional amount and filed claims for less than $10,000 in federal court. At no time was there an actual controversy in federal court involving the jurisdictional minimum. The Court of Appeals in applying the *Horton* rule held in all three cases that the federal jurisdictional amount requirement was *not* satisfied.

QUESTION PRESENTED

1. Does federal jurisdictional amount exist in workman's compensation insurer's diversity suit to set aside administrative board's award of less than $10,000 where defendant-employee (Respondent) claims less than $10,000 in federal court.

STATEMENT

Hart v. United States Fidelity and Guaranty Company, No. 318.

Respondent-Hart, an injured workman, filed a general claim (hurt back) with the Texas Industrial Accident Board.

and was awarded $910. Respondent-Hart did not claim any specific sum of money before the Accident Board. Petitioner-insurer brought suit in federal court to set aside the $910 award, alleging that the amount in controversy exceeded $10,000. The defendant employee (a) moved to dismiss for want of federal jurisdiction, (b) denied that the amount in controversy exceeded $10,000, and (c) counterclaimed for $6,310. The Respondent-Hart also brought suit in state court to set aside the award and to obtain $6,310 in compensation. The Petitioner filed a plea in abatement to respondent's state suit and that action is still pending. On the day of trial, the Respondent consented to federal jurisdiction over his $6,310 claim and trial resulted in a judgment in his favor for $1,224. At no time was there an actual claim in federal court for more than $6,310. The Court of Appeals reversed, holding federal jurisdiction did not exist. Respondent-Hart's petition for writ of certiorari filed in *advance* of the judgment of the Court of Appeals was denied. 368 U. S. 899.

Standard Accident Insurance Company v. Aguirre, No. 319.

Respondent-Aguirre filed a claim for total and permanent disability with the Texas Industrial Accident Board and was awarded $146.65. Petitioner insurer brought suit in federal court to set aside the award, alleging that the amount in controversy exceeded $10,000. Later that same day Respondent-Aguirre brought suit in State Court to set aside the Board's award and to claim $14,035 in compensation. Respondent (a) moved to dismiss the Petitioner's federal suit for want of federal jurisdiction; (b) denied the existence of

federal jurisdictional amount; and (c) counterclaimed in federal court for $8,750. The Respondent-employee then amended his state court complaint to seek only $8,750 and filed a stipulation in federal court that he would not amend his state petition to claim a greater sum. The federal district court after a *hearing* on the jurisdictional issues dismissed for want of jurisdiction. The Court of Appeals affirmed.

SUMMARY OF ARGUMENT

The decisions below do not conflict with any applicable decision by this Court. In *Horton v. Liberty Mutual Insurance Company, 367 U. S. 348*, the plaintiff-compensation insurer's federal complaint *correctly* alleged that the defendant-employee would claim more than $10,000 in the federal action. The basic premise urged by Petitioners is that the existence of the amount in controversy is determined by the plaintiff's complaint. Respondents, however, contend that the plaintiff's allegations do not create an irrebuttable fiction. The basic premise of Respondents is that where the plaintiff-insurer's federal complaint *incorrectly* alleges (or fails to allege) that the employee will claim more than $10,000 in federal court, *federal jurisdiction does NOT exist*. Once a jurisdictional allegation is traversed, the suit must be dismissed unless the plaintiff (petitioner) proves its allegation to be correct. *McNutt v. General Motors Accept. Corp., 298 U. S. 178*. An incorrect jurisdictional allegation can not and does not affix jurisdiction. Because the respondent-employee

is the master of the sum for which he will counterclaim, a denial by the employee that he will claim in federal court more than $10,000, or a counterclaim for less than $10,000, will establish as a matter of law the *non-existence* of federal jurisdictional amount. A party has the right to claim less than $10,000 for the express purpose of defeating federal jurisdiction. *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294.*

Under the substantive rights created by the Texas Workmen's Compensation Act: (1) the suit to set aside the Board's award does *not* revive the amount of the initial administrative claim; (2) the suit by the insurer does *not* put into issue the employee's right to compensation as the employee must affirmatively counterclaim; and (3) the insurer's right is *not* declaratory in nature, hence declaratory judgment cases are not applicable. Article 8307, Section 5, Texas Civil Statutes; *Booth v. Texas Employers' Ins. Ass'n, 132 Tex. 237, 123 S. W. 2d 322; Morris v. Maryland Casualty Co., 130 S. W. 2d 1080.* In the case at bar the largest judgment by the federal court that could be rendered when the insurer's federal suit was filed would be the amount of the Board's award (here $910.00 and $146.56); the largest judgment that could be rendered after the employee's answer and counterclaim would be the amount of the counterclaim (here less than $10,000). Thus it is a "*legal certainty*" that the federal court could *never* have entered a judgment above the jurisdictional minimum. Since it is legally impossible to enter a judgment for more than $10,000, *federal jurisdiction*

fails. Vance v. Vandercook Co. (No. 2), 170 U. S. 468, 472. See *Horton v. Liberty Mutual, 367 U. S. 348, 353.*

The amount the employee claimed before the Board does not determine federal jurisdiction. *Horton v. Liberty Mutual, 367 U. S. 348.* Likewise the amount claimed (or that could be claimed) in a collateral state court suit can not be used to affix federal jurisdiction. *Cf. Healy v. Ratta, 292 U. S. 263; Elgin v. Marshall, 106 U. S. 578.* Moreover the federal court does not have power to restrict the employee's claim before the state court. 28 U. S. C. §2283; See *Amalgamated Clothing Workers v. Richman, 348 U. S. 511.*

It is not the obligation of the federal court to "find" jurisdiction where none appears; it is the obligation of the *plaintiff* to show jurisdiction. The federal judicial policy has traditionally been against the expansion of federal jurisdiction. Our courts recognize they have a duty to dismiss for want of jurisdiction. *Healy v. Ratta, 292 U. S. 263; American Fire & Cas. Co. v. Finn, 341 U. S. 6.* Congress has commanded under 28 U. S. C. §1332(a), that diversity actions can not be brought in federal court unless the matter in controversy therein exceeds $10,000. These suits do not come within the statute. Federal jurisdiction fails.

ARGUMENT

1. THE DECISIONS BELOW ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

For the reasons which follow it is respectfully submitted that the Fifth Circuit holding is in full accord both with the Supreme Court's decision in *Horton v. Liberty Mutual Insur-*

ance Company, 367 U. S. 348, and with the established concepts of federal jurisdiction. Petitioners try to misrepresent the holding below in order to manufacture a conflict.

Before specifically discussing the *Horton* case and related jurisdictional doctrines, it is essential that there be an accurate understanding of the precise nature of the rights created under the Texas Workmen's Compensation Act. As stated in *Horton*, although the test for determining federal jurisdiction is purely a matter of federal law, the nature of the substantive rights created is entirely a matter of local law. 367 U. S. 348, 352-353.

A. *Nature of Rights Created by Texas Compensation Act.*

1. *Insurer's Right Is to Set Aside Award.*

Under the Texas statute, Article 8307, Section 5, the *insurer*, where dissatisfied with the Board's award, is given the right to set it aside by merely filing a suit for such purpose. The insurer's sole right is to set aside the Board's award. And this right does *not* put in issue the employee's right to any sum in excess of the Board's award. It is firmly established under Texas law that if the employee wishes to put in issue a greater sum than the Board's award the defendant-employee must actually file an affirmative counterclaim.[1] The Supreme Court in *Horton*

[1] In *Morris v. Maryland Casualty Co., 130 S. W. 2d 1080 (Tex. Civ. App. 1939)*, the employee filed a general claim before the Board which would entitle him to claim total and permanent disability in a subsequent court suit. The Board awarded $450 which satisfied the employee. The insurer brought suit to set aside the award in the Texas County Court which has a maximum jurisdiction of $1,000. The employee moved to dismiss alleging that the amount in controversy was over $1,000. Since the employee did not counterclaim for over $1,000, jurisdiction was upheld and the Board's award was automatically vacated. The *Morris* case is a correct application of Texas law. *See Bowles v. Texas Employers' Ins. Assn., 132 Tex. 247, 123 S. W. 2d 323 (1938).*

recognized the true nature of the Texas act by citing the controlling Texas decisions of *Booth v. Texas Employers' Ins. Assn., 132 Tex. 237, 123 S. W. 2d 322; Zurich General Accident Co. v. Rodgers, 128 Tex. 313, 97 S. W. 2d 674; Texas Reciprocal Ins. Assn. v. Ledger, 128 Tex. 319, 97 S. W. 2d 677*, (the latter case illustrates the right and necessity of the employee to cross-act when the insurer brings suit to set aside the award).

2. Insurer's Right Is Not Declaratory in Nature.

The nature of the Texas act precludes the use of declaratory judgment cases as authority in determining jurisdiction amount for at least two reasons. First of all, the insurer has *no* right to seek *general declaratory relief* for either determining questions of liability or compensation; its rights are governed under the specific statute.[2] Thus the Petitioner's argument that it brought suit to be relieved of a "potential" liability has no merit. Second, even if the instant suits by the insurers could be classified declaratory in nature, federal jurisdictional amount could not exist. The insurer's suit is not, and indeed could not be, a declara-

---

[2] Article 8[illegible] section 5, details the conditions and basis for setting aside the Board's award, including the requirement that notice not to abide be filed with the Board and suit be thereafter commenced within twenty days. If either the insurer or the workman fail to follow such steps the Act expressly provides that "then said [Board's] final ruling and decision shall be binding upon all parties thereto. * * *" There is no reported case in which an insurer or employee has been permitted to review the Board's award under the Texas Declaratory Judgment Act (Article 2524, Vernon's Civil Statutes).

tory action to cancel an insurance policy where the face amount of the policy governs jurisdictional amount.

The *coup de grace* to a declaratory judgment argument is delivered by the *Horton* decision. For although the dissent in *Horton* question the majority of predicating jurisdictional amount as though the suit were declaratory in nature, the *Court's opinion* was very careful not to predicate its holding on a declaratory basis.

B. *Application of Horton decision.*

The position of the workman in *Horton* was that federal jurisdictional amount had to be determined by the plaintiff's cause of action without reference to any counterclaims, and that the plaintiff's (insurer's) cause of action was only to set aside the Board's award.[4] Neither the majority nor dissenting members of the court questioned the position that the insurer's right was only to set aside the award. The cleavage in *Horton* came on the issue of whether jurisdiction existed where the plaintiff *correctly* alleged that the employee would counterclaim for more than $10,000. This *correct* allegation was the basis of the

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E.g. in *Hartford Accident & Indemnity Co. v. Northwest National Bank*, 228 F. 2d 391, 402 (7th Cir. 1955), jurisdictional amount was upheld because the declaratory judgment proceeding brought into controversy the validity of the policy and hence its face amount. In the cases at bar the employee is only a beneficiary and the insurance companies cannot (and are not attempting to) proceed against the employee for a declaration that the policy issued to the workman's employer is void. Such suit could only be brought against the employer.

[4] *Horton v. Liberty Mut. Ins. Co.*, No. 478, October Term, 1960, Brief For the Petitioner, p. 17: "Petitioner's basic position is that the amount in controversy under 28 U.S.C. § 1332 is to be determined from the claim for relief, i.e., the cause of action, asserted by plaintiff's (Respondent's) complaint." *Id.*, p. 16: "The Respondent-insurer's cause of action *is* to set aside the $1,050 award; nothing more. It is the Petitioner-employee who was injured and who has the right to seek compensation. The insurer's right is to set aside the Board's award."

Supreme Court holding that federal jurisdictional amount existed. The precise issue now before this Court is whether federal jurisdictional amount is present where the plaintiff-insurer *incorrectly* alleges that the defendant-employee will claim more than $10,000 in federal court.

Under applicable Supreme Court cases the incorrect allegation that the injured employee will claim more than $10,000 in federal court is not sufficient to *affix* federal jurisdiction. It is well established that a mere allegation that the jurisdictional amount is present does not create any irrebuttable fiction. In *McNutt v. General Motors, 298 U. S. 178*, the plaintiff alleged that the jurisdictional amount was present: the defendant denied such allegation. The case was dismissed for want of jurisdiction. The *McNutt* rule is: If a jurisdictional allegation is denied, the action must be dismissed unless the plaintiff (party invoking federal jurisdiction) proves the existence of jurisdiction. This is exactly what the district court did here in Aguirre.

Although, generally speaking, the amount claimed by the plaintiff controls for purposes of establishing jurisdictional amount of unliquidated sums, there are two exceptions to this general rule: (1) where plaintiff's claim is not made in "subjective" good faith and (2) *where it would be legally impossible for a judgment to be rendered which would satisfy the jurisdictional amount requirement* (objective good faith). In the cases at Bar it is not necessary for the trial court to make a determination of the plaintiff-insurer's *subjective* good faith for it appears to a *legal*

certainty" that at no time could a judgment have been rendered in excess of the jurisdictional minimum. See *Horton v. Liberty Mutual*, *367 U. S. 348, 353*, and cases cited therein at note 13. At the time the Petitioners-insurers' suit was filed a judgment could not possibly exceed the amount of the Board's award ($910 and $146.65). After the Respondent-employee had answered and filed his counterclaim, the largest judgment that could be possibly entered would be for the amount of such counterclaim (which was beneath the federal jurisdictional amount).

The Supreme Court in *Vance v. Vandercook Co. (No. 2)*, *170 U. S. 468-672*, held:

> "In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that *if from* the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum."

This principle that federal jurisdiction fails if it is legally impossible to grant a judgment in excess of the jurisdictional minimum was recognized by this Court in *Bell v. Preferred Life Assurance Society*, *320 U. S. 238*. Jurisdiction existed in *Bell* because the Court held it was legally possible for the plaintiff to claim such punitive damages, which when added to the actual damages sought, exceeded the jurisdictional minimum.

The insurance companies have failed to point out any time during which it would be *possible* for the *federal* court to enter a judgment for over $10,000. The insurance

companies have failed to point out any time in the federal court suit where there was an actual, justiciable controversy over more than $10,000. It is a legal certainty that a judgment could not have been entered for more than $10,000. To predicate federal jurisdictional amount upon *potential*, but not existent counterclaims would not only be contrary to the expressed and controlling command of Congress, 28 U.S.C. §1332(a), but would raise questions with Constitutional overtones. Federal Courts under Article III of the Constitution may exercise jurisdiction over only actual, justiciable controversies; jurisdictional amount cannot be predicated upon less.

The Petitioner-insurer's allegation, as noted earlier, does not affix jurisdiction for it merely anticipates what the employee may claim. Thus the rule, once federal jurisdiction attaches that it is not ousted by subsequent events, has no application—jurisdiction has not "attached". It is clear under the *Horton* decision that jurisdiction will only be affixed if the employee admits (or fails to deny) he is going to claim more than $10,000 in federal court or counterclaims for such amount. (Subject to his motion to dismiss, Horton admitted he would claim more than $10,000 in federal court and indeed actually counterclaimed for $14,035.) Mr. Justice Black, speaking for the court in *Horton*, stated: "*No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by the petitioner.* * * *" 367 U. S. 348, 353* (emphasis added). The insurance companies have chosen blissfully to ignore

this portion of the Court's holding. We submit that it is the very crux of the *Horton* decision, for if it is ignored the opinion cannot be given a rational explanation.

As noted in the *De Paul Law Review*: "Since these factors [Horton's counterclaim; Horton's admission that he would claim the jurisdictional sum; etc.] all happened *after* the filing of the company's suit, the Supreme Court is relying on events occurring after the suit was filed in the District Court in order to established that the averred $14,035 is in controversy." *9 De Paul Law Review 130, 132 (1961).*

Respondents assume that the Supreme Court meant what it said about the employee's right of denial; thus federal jurisdiction is not affixed until it is determined that the plaintiff's allegation is *correct.*

C. *Amount Claimed Before Board or Amount Claimed in State Court Does NOT Affix Federal Jurisdiction.*

With reference to the amount claimed before the Accident Board, there are several basic principles why such claim should not govern federal jurisdictional amount.

First, and foremost, the Supreme Court in *Horton* expressly rejected such basis for determining federal jurisdic-

Of interest, counsel for the Insurance Company in *Horton* had expressly argued: "Of course, petitioner was not required to counterclaim for $14,035; he could have sued for $9,900 if he desired." Respondent's Reply to Petition for Writ of Certiorari, p. 10; quoted in Reply Brief For the Petitioner, p. 3 (No. 478, October Term, 1960). While the position of the parties in *Horton* is no way controlling upon the present parties, the position that federal jurisdiction can be defeated by counterclaiming for less than $10,000 does seem to have been approved by the Supreme Court.

tion. "It therefore is not controlling here that Texas has held that the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board." 367 U. S. 348 at 353.

Second, only if the suit to set aside the Board's award were an appeal could the amount claimed before the Board be determinative of the amount in controversy. The Supreme Court in *Horton* expressly held that the insurer's suit to set aside the administrative award was an *independent de novo* action. 367 U. S. 348, 354-355. The initial administrative claim merged in the Board's award; and the amount of such initial claim is *not* revived by the filing of suit to set aside the Board's award. This is why it is necessary to counterclaim. The Texas Supreme Court in *Booth v. Texas Employers' Ins. Assn.*, *132 Tex. 237, 249, 123 S. W. 2d 322*, stated:

> "It has repeatedly been held that, although one claim cannot be filed with the Board and another and different claim asserted in court, yet when the injury suffered is of that class of injuries, sometimes called general injuries, for which the compensation is based upon incapacity to work, and not of that class of injuries usually called specific injuries, for which the amount of compensation is fixed by the statute, a general description of the injury is sufficient in the claim made before the board, and that in the suit filed to set aside the award of the board the claim may be enlarged to include all injuries proximately resulting from the accident."

As stated in *Horton*, there is no difference between a suit commenced by an insurer wherein the employee counterclaims for $14,035 and a suit commenced by the employee in which he seeks $14,035 ("No matter which party brings it into court, the controversy remains the same. * * *" 367 U.S. 348, 354). This does not, of course, mean that a suit brought by the insurer to set aside the award in which the employee *does not counterclaim* would involve the same controversy where the employee brings suit or counterclaims. In *Horton*, the employee had counterclaimed for $14,035.

Third, where the matter in controversy in federal court is beneath the jurisdictional minimum, there is no applicable authority which holds that the amount in controversy before an administrative tribunal can be used to satisfy federal jurisdiction amount. Moreover, *Healy v. Ratta*, *292 U. S. 263, 268*, controls to the contrary: "The statute itself does not speak of objects of the suit. It confers jurisdiction only if 'the matter in controversy exceeds [the jurisdictional minimum].'"

With reference to the amount the employee claims in state court, this sum too does not affix federal jurisdiction. The only time the amount claimed in state court would be significant is for purposes of *removal* jurisdiction. There is absolutely no case which has ever held that the amount in controversy in federal court is determined by the sum claimed, or which could be claimed, in a *collateral state* court suit. The

only basis for such argument would be under the principles of *res judicata*. And the Supreme Court has held that the concepts of *collateral estoppel* and *stare decisis* may *not* be utilized in order to manufacture federal jurisdictional amount. *Elgin v. Marshall, 106 U. S. 578; Healy v. Ratta, 292 U. S. 263.*

As discussed in the preceding paragraphs, the amount claimed before the Board or the amount claimed in state court cannot be used to affix federal jurisdictional amount. Where the employee specifically claimed more than $10,000 before the Board, as was done in *Horton*, this might be relevant to find whether the *insurer's* allegation that the employee would claim more than $10,000 in federal court was made in *subjective* good faith. But as stated earlier, the *subjective* faith of the plaintiff-insurer is not at issue since *lack* of jurisdictional amount here appears to a *legal certainty.*

D. *Employee Has Right to Claim Less Than $10,000 in Federal Court and More Than $10,000 in State Court.*

There is no legal inconsistency in holding that the employee has a right to claim less than $10,000 in federal court in order to defeat federal jurisdiction, and subsequently claim more than $10,000 in state court. The employee has such right under decisions by this Court. In *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294*, the Court noted that a party has an absolute right to defeat federal

jurisdiction by pleading for less than the jurisdictional minimum. And where the federal court lacks jurisdiction over a controversy it has no power to interfere with a counterpart suit in state court. 28 U. S. C. §2283; *Amalgamated Clothing Workers v. Richman, 348 U. S. 511.*

If the employee chooses to claim more than $10,000 in state court the insurer's rights as to the federal forum depend upon removal jurisdiction. Congress, which is conferred the right under our Constitution to limit federal district court jurisdiction, has taken away the insurer's right to remove. 28 U. S. C. §1445(c). If the insurer questions the wisdom of such policy, the avenues of congressional appeal are available. And likewise, we do not believe that Judicial Branch should rewrite the jurisdiction statute especially to permit an insurance company to bring suit in federal court where it appears to a legal certainty that the actual controversy is for *LESS* than $10,000. 28 U. S. C. §1332(a).

CONCLUSION

The four dissenting members of this Court in *Horton v. Liberty Mutual, 367 U. S. 348,* stated that the amount in controversy had to be determined from the plaintiff's cause of action without reference to what the defendant would claim. The majority upheld jurisdiction because the plaintiff correctly alleged that the defendant would claim more than $10,000 in federal court. It would appear that the only valid reasoning for granting certiorari here would be if the Court

wished to reexamine the *Horton* decision. In the cases at bar, however, federal jurisdiction does *not* exist under *either* the majority or dissenting views of *Horton*.

Accordingly, Respondents pray that certiorari be denied.

Respectfully submitted,

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No. 317

In the

Supreme Court of the United States

OCTOBER TERM, 1962

HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner,

v.

ADAM McINTYRE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 317

In the

Supreme Court of the United States

OCTOBER TERM, 1962

HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner,

v.

ADAM McINTYRE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMENDED BRIEF OF THE RESPONDENT IN OPPOSITION

MOTION TO WITHDRAW ORIGINAL BRIEF IN OPPOSITION

Respondent McIntyre respectfully moves to withdraw his Original Brief in Opposition to the Petition for Writ of Certiorari, and substitute in lieu thereof the following Amended Brief. The original brief pointed out that jurisdictional amount in McIntyre did not even exist under the

state test for determining the amount in controversy. Since Federal jurisdictional amount is determined by Federal standards, to avoid any confusion and for purposes of clarity, the Respondent desires to substitute this shorter brief.

Respectfully submitted,

JOE H. TONAHILL

PRELIMINARY STATEMENT

This action involves the matter of the requisite amount in dispute between diverse parties for federal jurisdiction. Recently this Court decided the question in *Horton v. Liberty Mutual Insurance Company, 367 U. S. 348*. There, the insurer brought suit to relieve itself of a $1,050,000 debt to Horton ordered by the Industrial Accident Board of Texas. Horton moved for a dismissal for want of the requisite amount of $10,000.00 in dispute and counterclaimed subject to his motion to dismiss for $14,035.00. The District Court dismissed.

Here, in McIntyre, the Petitioner, Hardware Mutual Casualty Company (of Wisconsin), filed suit in Federal Court to set aside an award of the Industrial Accident Board of Texas against it in favor of McIntyre in the sum of $330.15. McIntyre moved to dismiss for lack of the requisite jurisdictional amount of $10,000.00 and counterclaimed for $9,000.00. The Federal Judge dismissed for lack of jurisdiction.

We adopt the arguments of Respondents Hart and Aguirre in 318 and 319 currently pending before this Court.

QUESTION PRESENTED

Does a requisite Federal jurisdictional amount exist in a workmen's compensation insurer's appeal de novo diversity suit to set aside administrative board's award of less than $10,000.00 where defendant-employee (Respondent McIntyre) counterclaims for less than $10,000.00 in Federal court?

STATEMENT

Petitioner Hardware Mutual Casualty Company erroneously contended and contends that the State test applies as announced by the Supreme Court of Texas in *Booth v. Texas Employers' Insurance Association*, 123 S. W. 432 and the decision of the Fifth Circuit Court of Appeals in *Liberty Mutual Insurance Company v. Horton*, 275 F. 2d 148 which was clearly rejected by this Court in both the majority opinion by Mr. Justice Black and the vigorous dissent by Mr. Justice Clark.

Below, the Fifth Circuit Court of Appeals in this McIntyre case, in carefully following the mandate of this Court in Horton, clearly held that the requisite Federal jurisdictional amount did not exist.

We respectfully state that Your Honors correctly decided the crucial question in Horton as stated by Mr. Justice Black in part as follows:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, * * *".

rejecting the state standards as announced in *Booth v. Texas Employers' Insurance Association, 123 S. W. 2d 322,* and which was contended for by respondent-insurer Liberty Mutual Insurance Company.

We furthermore respectfully urge that in addition to re-affirming the test laid down by the majority in Horton, it would greatly serve alike the interests of the bench and bar of this nation if Your Honors would adopt the view contained in the dissent by Mr. Justice Clark in Horton.

We say this in the hope that Your Honors will set at rest for all time the important matter of requiring that the federal jurisdictional amount be determined from the causes of action alleged by the plaintiff-insurer without reference to the prospective or potential claim of the defendant-employee (Horton).

Therefore, perhaps certiorari should be granted here in order that Your Honors re-examine the *Horton* decision and curtail jurisdiction in those cases where the employee counterclaims for less than $10,000.00 in Federal court though he sues directly in state court for an amount in excess of $10,000.00 as prescribed for the state test in *Booth v. Texas Employers' Insurance Association 123 S .W 2d 322, Article 8306, Section 10, and Article 8307, Section 5, VACS.*

SUMMARY OF ARGUMENT

As stated, we adopt by reference the arguments of Respondents in the Hart (No. 318) and the Aguirre (319) now currently pending before Your Honors.

An incorrect jurisdictional allegation cannot and does not determine jurisdiction. *McNutt v. General Motors Acceptance Corporation, 298 U. S. 178.* McNutt has the right to counterclaim for less than $10,000.00 for the express purpose of defeating Federal jurisdiction. *St. Paul Mercury Indemnity Company v. Red Cab, 303 U. S. 283, 294.*

The Workmen's Compensation Act of Texas and its substantive features in a suit to set aside the Industrial Accident Board's award does not revive the amount of the claim made by the employee before the Industrial Accident Board as held in *Booth v. Texas Employers' Insurance Association, 123 S. W. 2d 322 where Federal jurisdiction is concerned.*

Therefore the appeal of Hardware Mutual Casualty Company to the Federal court from the Board's award does not and cannot put into issue the employee McIntyre's right to compensation. Before such an issue as to the requisite jurisdictional amount in excess of $10,000.00 can be raised, the employee McIntyre must affirmatively counterclaim for an amount in excess of $10,000.00 and of course here this was not done. Therefore, jurisdiction did not attach in Federal court and the Federal Judge was correct in dismissing. Actually what the Petitioner Hardware Mutual Casualty Company is contending for is a right sounding declaratory in nature. Declaratory judgment cases are not applicable. *Article 8307, Section 5, VACS; Booth v. Texas Employers' Insurance Association, 123 S. W. 2d 332; Morris v. Maryland Casualty Company, 130 S. W. 2d 1080.* Thus, the largest judgment by the Federal Court that could be rendered in this *McIntyre* case when the insurance com-

pany filed its suit in Federal court would simply be the amount of the Board's award which was $330.15. Not having jurisdiction for this amount, of course the Federal Judge could not entertain it.

The largest amount that could be rendered by the Federal Judge after Respondent McIntyre's Answer and Counterclaim would be the amount of the counterclaim which was $9,000.00. This being less than the requisite $10,000.00 jurisdictional amount, the Federal Judge was correct in not entertaining it either.

It is therefore a legal certainty that the Federal Court could never have entered a judgment above the jurisdictional minimum of $10,000.00. Therefore this impossibility to enter a judgment for more than $10,000.00, the Federal Judge was correct in deciding that federal jurisdiction inevitably failed. *Vance v. VanDercoo Key Company, 170 U. S. 467, 472; Horton v. Liberty Mutual Insurance Company, 367 U. S. 348, 353.*

Your Honors reaffirmed the Federal test in *Horton v. Liberty Mutual Insurance Company, 367 U. S. 348,* in deciding that an amount an employee claims before the Industrial Accident Board does not determine or fix Federal jurisdiction. For the same reason, the amount claimed under a collateral state court suit cannot be used to determine federal jurisdiction. *Healy v. Ratta, 292 U. S. 263; Elgin v. Marshall, 106 U. S. 578.*

Naturally the Federal Courts do not have any power to restrict an employee's claim before state courts. *28 U. S. C.*

Section 2283; Amalgamated Clothing Workers v. Richman, 348 U. S. 511.

The Petitioner Hardware Mutual Casualty Company has the duty to show jurisdiction. There is no obligation on the part of the Federal court to find jurisdiction if it doesn't appear from the pleadings. This is especially true since the policy of the Federal judiciary is now and has always been against expansion of federal jurisdiction. It is readily recognized that the duty to dismiss such a contest for want of jurisdiction exists as it did in *Healy v. Ratta, 292 U. S. 263; American Fire & Casualty Company v. Finn, 341 U. S. 6.* There is no legal inconsistency in holding that the employee has a right to claim less than $10,000.00 in Federal court in order to defeat Federal jurisdiction and subsequently claim more than $10,000.00 in state court. This court has repeatedly allowed such right under its decisions. *St. Paul Mercury Indemnity Company v. Red Cab Company, 303 U. S. 283, 294; Amalgamated Clothing Workers v. Richman, 348 U. S. 511; 28 U. S. C. Section 2283.*

CONCLUSION

The only valid reason for granting certiorari here would be if the Court wished to re-examine the *Horton* decision in view of the fact that the four dissenting members of this court in *Horton v. Liberty Mutual, 367 U. S. 348*, speaking through Mr. Justice Clark, clearly demonstrated that the amount in controversy had to be determined from the plaintiff's cause of action without reference to what the defendant would claim. The majority upheld jurisdiction because

the plaintiff correctly alleged that the defendant would claim more than $10,000.00 in Federal court even though it was not a counterclaim subject to his motion to dismiss.

It is respectfully prayed that certiorari be denied.

Respectfully submitted,

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By Joe H. Tonahill
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AFFIDAVIT OF SERVICE

I, Joe H. Tonahill, of counsel for Respondent, do hereby certify that service of a copy of the foregoing Amended Brief in Opposition to Petition for Writ of Certiorari has been made on Petitioner by mail in accordance with the rules of this Court.

Dated this 22nd day of September, A. D. 1962.

Joe H. Tonahill
Joe H. Tonahill,
of Counsel for Respondent.

Office-Supreme Court, U.S.
FILED
NOV 15
JOHN F. DAVIS

Nos. 317, 318 and 319

In the

Supreme Court of the United States

No. 18557 (In U. S. Court of Appeals, Fifth Circuit)
HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner,

v.

ADAM McINTYRE,
(hereinafter called McIntyre)
Respondent.

No. 19184 (In U. S. Court of Appeals, Fifth Circuit)
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

v.

HORACE HART,
(hereinafter called Hart)
Respondent.

No. 19427 (In U. S. Court of Appeals, Fifth Circuit)
STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

v.

MARCOS V. AGUIRRE, JR.,
(hereinafter called Aguirre)
Respondent.

MOTION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STANDARD ACCIDENT INSURANCE COMPANY,
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v.

MARCOS V. AGUIRRE, JR.,
(hereinafter called Aguirre)
Respondent.

MOTION FOR REHEARING OF PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Simultaneously with the denial of the petition for writs of certiorari, this Honorable Court granted to counsel for Respondent, McIntyre, leave to file an amended brief in opposition to the petition for writs of certiorari which was completely at variance with his original brief. Petitioners, it is believed, were not furnished sufficient opportunity to reply

to the argument set forth in this amended brief and substantial grounds are available to Petitioners although not previously presented. Petitioners respectfully request the Court to consider the following answer to such argument.

PRELIMINARY STATEMENT

This motion for rehearing should be granted primarily because the denial of the petition for writs of certiorari leaves the important question of jurisdiction between state and federal courts in utter confusion. For this reason, even counsel for McIntyre suggests at page 4 of his amended brief that "Perhaps certiorari should be granted here".

ARGUMENT

1. Denial of the petition for writs of certiorari results in confusion and uncertainty.

This Honorable Court in *American Fire & Cas. Co. v. Finn, 341 U. S. 6, 95 L. Ed. 702*, said at p. 706:

> "As prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts, we granted certiorari."

No one could find any fault with the foregoing statement, it is believed. However, denial of the petition in these cases does violence to this pronouncement. COUNSEL FOR RESPONDENTS THEMSELVES HAVE RECOGNIZED THAT THE NEW RULE ADOPTED BY THE MAJORITY OF THE FIFTH CIRCUIT WILL PROMOTE CONFUSION AND HAVE URGED THIS HONORABLE

COURT NOT TO BASE JURISDICTION ON THE COUNTERCLAIM, AS THE FIFTH CIRCUIT DID.

Counsel for Respondents, Hart and Aguirre, has stated to this Court:

> "This Court in Horton v. Liberty Mutual Insurance Company, 367 U. S. 348, permitted a plaintiff to affix jurisdiction by correctly prophesying what the defendant would seek under his counterclaim. In effect, the naked allegation of jurisdictional amount suspends the determination of federal jurisdiction until the defendant affirmatively reveals the amount he seeks under his counterclaim. The Horton case goes no further. THE FOIBLE OF TENTATIVELY PREDICATING JURISDICTIONAL AMOUNT ON A CONJECTURAL SUM THAT THE DEFENDANT MAY CLAIM IS WELL ILLUSTRATED HERE." (Emphasis added.)

He not only referred to this as a "foible", but he further states at p. 12 of the brief filed herein:

> "To predicate federal jurisdictional amount upon *potential*, but not existent counterclaims would not only be contrary to the expressed and controlling command of Congress, 28 U.S.C.A. Sec. 1332(a), but would raise questions with Constitutional overtones."

Counsel for Respondent, McIntyre, who also represented Horton before this Honorable Court, stated in his original brief in opposition to the petition for writs of certiorari that determination of the amount in controversy "*is to be judged as of the time the original complaint is filed.*" He now amends; denies this; and says "Perhaps certiorari should be granted here."[1]

---

[1]This statement was made in Respondent Hart's Petition for Writ of Certiorari prior to the decision of the Fifth Circuit, at page 8 thereof. This review of Hart was sought simultaneously with counsel's motion for rehearing in Horton, the Hart case being used to illustrate the folly of the Horton decision.

The foregoing demonstrates beyond controversy that counsel for Respondents themselves are confused. It is indeed a rare case in which the basis for a decision by the majority of the Fifth Circuit Court satisfies neither Petitioners nor counsel for Respondents (who both participated in *Horton*) nor two of the Judges who participated in *Horton*. The *Horton* opinion by this Honorable Court has itself been a source of confusion to courts, litigants and to writers of legal treatises.[2] The following are examples of the confusion among legal writers:

36 Tulane Law Review 148, 149. This writer concludes that it cannot be determined which theory of federal jurisdiction Horton adopted. He suggested three alternatives: the plaintiff viewpoint theory based upon "the value of the right to be protected", the alternative valuation theory based upon the "value of the object sought", or a "realignment of the parties theory".

11 DePaul Law Review 130, 132. This article is critical of Horton, stating: "In recognizing Horton's actions after the filing of the insurance company's suit, the Court has departed from the existing federal rule forbidding reliance on such acts for establishing jurisdiction." He concludes that the Court relied on the counterclaim and thus "broke with precedent" in Horton.

22 La. Law Review 851, 857, concludes that "whatever criticism may be made of other portions of the decision, it appears clear that the Court did not consider itself to be departing from the plaintiff-viewpoint theory." "For this reason it would appear that the Court was not concerned with the counterclaim itself as a vehicle of jurisdiction, and that a counterclaim for less

[2]Witness the strange phenomenon of an apparently confused federal district judge eliciting a promise from a counterclaimant (Aguirre) that he would not do what he had a legal right to do, i.e., amend his state court pleadings. Petition for Writs of Certiorari, Page F-3, Finding No. (10). Of what effect are stipulations and orders of a court which determines that it has no jurisdiction to make them?

than $10,000 would not have defeated jurisdiction properly invoked by the filing of a complaint meeting the jurisdictional requirements."

1962 Duke Law Journal 123, 130. This writer was unable to determine if the "Plaintiff viewpoint rule" was applied or the "alternative valuation" rule. He concludes "the court's opinion fails to give a definite guideline for the lower courts, so that the uncertainty attendant to the application of the earlier rules has been replaced by uncertainty as to the proper interpretation of the holding in the instant case."

46 Minn. Law Review 960, concludes "however the court in the instant case did not look to the counterclaim for the purpose of determining the amount in controversy, but solely to see whether the amount set forth in the complaint was stated in "good faith". He also states "but in fact, the jurisdictional amount is determined from the plaintiff's viewpoint."

11 Amer. University Law Review 102, concludes "it is submitted, however, that the traditional version of the plaintiff viewpoint rule was not overturned in substance * * *."

Denial of the petition for writs of certiorari in the cases at bar heaps confusion on confusion about a matter that this Court has previously said should be governed by "definite and finally accepted principles". Petitioners, along with Judge Rives and Judge Hutcheson, believed that *Horton* was based upon "definite and finally accepted principles", that is, that jurisdiction is determined by the good-faith allegations in the complaint. The majority of the Fifth Circuit reversed this in favor of what appears to be a realignment of the parties doctrine *with the vital element of good faith omitted.*

2. Under the realignment of the parties doctrine, this Honorable Court's opinion in Horton becomes a vain and useless act.

Under the majority of the Fifth Circuit's opinion, the counterclaimant becomes the sole judge of jurisdiction and his determination is subject to review by no one. Thus, under this view, this Honorable Court in *Horton* established a rigid system whereby the federal trial judge will no longer be required to determine jurisdiction; rather, it will be determined for him by the counterclaimant. Thus, under this interpretation, this Honorable Court says that the insurance company has a right to sue in the federal court but this is subject to its adversary's determination of jurisdiction. If this is what *Horton* means, then the Court was, as a practical matter, wasting its own time in deciding *Horton* because such a "right" is no right at all. If this interpretation is correct, there was no need for the Court to set forth the guidelines for determining federal jurisdiction because *only the counterclaimant* makes this decision. EVEN RESPONDENTS THEMSELVES HAVE CRITICIZED THIS VIEW! Petitioners do not believe that this Honorable Court in *Horton* was so naive as to initiate a doctrine which removes from the federal court any control over its own jurisdiction. And yet this is the effect of the denial of the petition for writs of certiorari in the cases at bar. Petitioners believe with Judge Rives and Judge Hutcheson that the *Horton* case represents an application of the "general federal rule" to the facts then before the Court. Petitioners further believe the requirement of good faith must ultimately determine in many cases whether federal jurisdiction can be properly main-

tained. Petitioners do not believe that good faith should be abandoned or should be subject to exclusive, arbitrary and final determination from the mere pleadings of their adversary, the counterclaimant (who is subject to no requirement of good faith by the realignment test of the Fifth Circuit); but should be determined at a pre-trial hearing as set forth in the Federal Rules of Civil Procedure, *if the counterclaimant sees fit to challenge the good faith of the insurer.*

3. The realignment of the parties test prefers one litigant over another.

The "Realignment test" will make the federal courts available to the claimant, should he choose to file suit there; but the insurance company's suit may or may not be retained by the federal court, subject to the absolute discretion of the claimant. In declining to prefer one litigant over another, the Supreme Court of Texas observed in *Ford v. Carpenter, 216 S. W. 2d 558, 560:*

> "We cannot assume that the plaintiff's (claimant's) case is always meritorious or that the defendant is merely seeking to defeat or delay the payment of his just debt. As a court, we must view all parties impartially and assume that they will proceed in good faith * * *."

Undoubtedly, this Honorable Court had these same thoughts in mind when it held in *Horton* that "No matter which party brings it into Court, the controversy remains the same: it involves the same amount of money * * *." Denial of the petition for writs of certiorari repudiates the wholesome doctrine that, "as a court, we must view all parties impartially and assume that they will proceed in good faith."

Since the resident claimant may maintain his suit in federal court but the non-resident insurance carrier may not if the resident objects, this is not only a preference, but a preference that subverts the diversity statute, *28 U. S. C. A. sec. 1332.*

4. Permitting counterclaimant to determine whether a federal court has jurisdiction will delay disposition of cases and will increase the expense of administering justice.

This Honorable Court declared in the Finn case, *supra*, it stood for "prompt and economical" administration of justice. Under the rule of the majority of the Fifth Circuit, an insurance company still has a right to file a direct appeal in the federal court alleging that the injured party has claimed, is claiming, and will claim $14,035. The claimant, however, can defeat federal jurisdiction by filing a counterclaim for less than $10,000. Adjudication of the rights and obligations of both parties will thus be delayed in the federal courts while the question of jurisdiction is determined. Meanwhile, the state court proceeding will await disposition of the federal court case. Neither promptness nor economy will be subserved by this procedure.

5. Confusion can only be obviated if the amount in controversy on a direct appeal by the insurance company is determined from the insurer's standpoint.

When Petitioners filed suit in the federal court, the object sought was a judgment dictating that Respondents take nothing. In Petitioner's view, a potential liability in excess of $10,000 would be eliminated by such a judgment. Respond-

ents argue that before their counterclaims were filed, the maximum value of any judgment which could be entered by the federal court was the amount of the Board's award. From this erroneous premise, they conclude that the total amount in controversy prior to the filing of their counterclaims is the amount of the Board's award. (Hart and Aguirre brief, p. 11; McIntyre's amended brief, pp. 5 and 6.) Even the majority of the Fifth Circuit rejected this theory, stating: "One thing appears clearly from the foregoing language, that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to set aside the award." *Hardware Mutual v. McIntyre*, P. A-6, petition for writs of certiorari.

If an injured party claimed and was awarded $14,035 by the Industrial Accident Board, the insurance company sued to be relieved of this in the federal court, and suit in the state court was filed by claimant for $14,035 and a counterclaim for $5,000 was filed in the federal court, counsel for Respondents, to be consistent, would conclude that the federal court *had* jurisdiction. Apparently the majority of the Fifth Circuit would say that it did *not*. This is further illustration of the confusion which will result from denial of the petition for writs of certiorari. It further illustrates the fact that under the majority of the Fifth Circuit's opinion no good faith requirement is in operation and, in fact, bad faith is encouraged.

CONCLUSION

By denial of the writs herein applied for, this Honorable Court: (1) sanctions confusion in the important area of

federal jurisdiction; (2) departs from and nullifies the general federal rule that jurisdiction is determined by the good faith allegations in the complaint; (3) prefers one litigant over the other regardless of the merits, which is positively dangerous to a free society; (4) encourages delay and adds the burden of additional expense to the litigants; (5) repudiates the salutary pronouncements it made in *Finn*; and (6) having caused uncertainty by its decision in *Horton*, this Honorable Court abdicates its exclusive right and duty to clarify this confusion.

Wherefore, Petitioners pray that this matter be reconsidered and this motion for rehearing be granted, that petitions for writs of certiorari in each of the three cases be granted, and that they have the relief prayed for therein.

Respectfully submitted,

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By Reo Knowles
Of Counsel

CERTIFICATE

I, Reo Knowles, of counsel for Petitioners, do hereby certify that the foregoing motion for rehearing is presented in good faith and not for delay and further that this petition for rehearing is restricted to substantial grounds available to Petitioners although not previously presented.

I do further certify that service of copies of the foregoing motion for rehearing has been made on each of the Respondents by mail in accordance with Rule 33 of the Rules of this Court.

Dated this 14th day of November, 1962.

Reo Knowles

REO KNOWLES,
Of Attorneys for Petitioners.